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Supreme Court, U.S.
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OFFICE OF THE CLERK

In the

Supreme Court of the United States

MICHAEL ELBERY,

Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent

On Petition for a Writ of Certiorari
to the Massachusetts Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Michael Elbery, pro se
168 Fairfield St.
Needham, Mass. 02492
781-444-7324

107 pp

Questions Presented for Review

1. Where the U.S. Constitution guarantees the defendant effective assistance of appellate counsel were the Massachusetts courts in conflict with the Due Process Clause of the 14th Amendment of the U.S. Constitution and the Supreme Court of the United States by waiving the defendant's "motion for new trial" claims based on the state procedural "Mass. issue waiver rule"?

2. Whether the state courts may arbitrarily apply Massachusetts law in order to evade Constitutional issues raised by the defendant and escape a miscarriage of justice?

3. Where the Commonwealth admits the evidence the prosecution used at trial to convict the defendant was perjury, but claims it was permissible to allow the jury to sort out that perjury, were the state courts in conflict with the 14th Amendment Due Process Clause of the U.S. Constitution and the Supreme Court of the United States by not deciding the prosecution had a duty to correct the perjury they knowingly used at trial?

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A.D.A.	Assistant District Attorney
App.	Appendix
Arg.	Argument
CBr.	Commonwealth's Appeal Brief (02-P-318)
DBr.	Defendant's Appeal Brief (02-P-318)
DRb.	Defendant's Reply Brief (02-P-318)
D.A.	District Attorney/Commonwealth on appeal
PC	Probable Cause Hearing Transcript
PD	Police Dept.
RA	Record Appendix (motion for new trial)
T&G	Telegram and Gazette
TR	Trial Transcript
WPD	Worcester Police Dept.

SUPREME COURT OF THE UNITED STATES

Michael Elbery, petitioner

v.

Commonwealth of Massachusetts

PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

The Petitioner, Michael Elbery, (hereinafter defendant) respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in the case Commonwealth v. Elbery 02-P-318.

OPINION BELOW

The judgment of the Mass. Appeals Court, App. C, on the appeal of the denial of the defendant's motion for new trial was not reported. The decision of the Mass. Superior Court motion judge, App. E, on the defendant's motion for new trial was not reported. The decision of the Mass. Appeals Court on the defendant's direct appeal is reported in 38 Mass. App. Ct. 912, rev. denied, 419 Mass. 1107 (1995).

JURISDICTION

The decision of affirmation by the Mass. Appeals Court on the defendant's appeal of the denial of his motion for new trial was entered on March 10, 2003, App. C. The defendant on 3-31-03 filed a timely Application for Further Appellate Review to the Mass.

SJC. The Mass. SJC exercised their discretion not to review the defendant's appeal, application was denied on June 5, 2003. App. A. The defendant waived his optional Petition for Rehearing before the Mass. Appeals Court. App. B.
The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. s. 1257a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment - Due Process;
The Due Process Clause of the Fourteenth Amendment provides in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor any State deprive any person of life, liberty, or property, without due process of law." U.S. Constitution Amendment XIV Section 1.

Sixth Amendment - Right to Counsel;
In all criminal prosecutions, the accused shall enjoy the right....., and to have the Assistance of Counsel for his defence. U.S. Constitution Amendment VI.

M.G.L. C. 265 s. 15. Assault; intent to murder or maim;
Whoever assaults another with intent to commit murder, or to maim or disfigure his person in any way described in the preceding section, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

M.G.L. C. 265 s. 14. Mayhem;
Whoever, with malicious intent to maim or disfigure, cuts out or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts slits or mutilates the nose or lip, or cuts off or disables a limb or member, of another person, and whoever, with intent to maim or disfigure, assaults another person with a dangerous weapon, substance or chemical, and by such assault disfigures, cripples or inflicts serious or permanent physical injury upon such person, and whoever is privy to such intent, or is present and aids in the commission of such crime, shall be punished by not more than 20 years in state prison, or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and half years.

M.G.L. C.265 s.15Bb. Assault with dangerous weapon;
Whoever, by means of a dangerous weapon, commits an assault upon another shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than one thousand dollars or imprisonment in jail for not more than two and one-half years.

M.G.L. C. 265 s. 13A. Assault and Battery;
Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

M.G.L C. 272 s. 53. Penalty for Certain Offenses - "Disorderly Person";
.....idle and disorderly persons, disturbers of the peace....may be punished by imprisonment in a jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars or both.

STATEMENT OF THE CASE

This case is about how the Massachusetts Courts used the unconstitutional "Mass. issue waiver rule" to avoid the defendant's "motion for new trial" claims that proved to a medically documented certainty that the evidence used to convict the defendant was perjury. In so doing, the Mass. Courts violated the defendant's right under the 14th Amendment to Due Process of Law.

A. Undisputed Background Facts

1. *The citizen's arrest-initial criminal charges.* The defendant entered a bar in Worcester on 9-29-92 at 1:30am at last call and was served, and never asked to leave. TR 1081-12. A verbal argument between the bartender and the defendant ensued shortly after. App. 23a. An off-duty out of jurisdiction Westboro police officer, Tom King, took the side of his friend the bartender. App. 23a. It is undisputed that King and his friends pursued the defendant down the street after the defendant fled the bar. App. 24a. Although the trial testimonies of all witnesses were substantially different, as to how and what happened when King actually reached the defendant, King testified and documented, RA 139 (Westboro PD report-last ¶), he made a citizen's arrest. App. 31a. King testified and documented he prevented the defendant from escaping, RA 39. It was undisputed at trial that no contact occurred between King and the defendant until after King pursued the defendant 100 yards down the street. DBr. 25 & App. 24a.

The Worcester Police arrived and charged the defendant with "disorderly conduct" (M.G.L. C. 272 s. 53) at about 1:47a.m. on 9-29-92 while the defendant was laying face down in the street outside the Winner's Circle Bar under the weight of three men, RA 129 (WPD incident report) and PC 162-23, PC 159-7. By 8:00am the charges were increased to include "mayhem" (M.G.L. C. 265 s.14) (taking out King' s

eye), "assault dangerous weapon" (M.G.L. C. 265 s. 15Bb) (broken beer bottle), "assault and battery" (M.G.L. C. 265 s. 13A)(a punch). RA 134. The prosecution would claim the defendant committed these crimes after King's citizen's arrest. App. 14a & 24a.

2. No Probable Cause Found by Worcester District Judge. A probable cause hearing was held regarding those charges in Worcester District Court before Judge Milton Raphelson on 1-20-93. The prosecutor reduced the charge of "mayhem" to "assault with intent to maim" (hereinafter -"attempted mayhem") (M.G.L. C. 265 s. 15) (attempting to take out King's eye) before the start of that probable cause hearing, RA 159 (docket 93-0135), PC 3. After five hours of testimony from five witnesses and none by the defendant, Judge Raphelson found there was no probable cause to arrest the defendant for the four charges before him. Raphelson explained that the off-duty Westboro police officer and alleged victim, Tom King, had no right under Mass. law to pursue and stop the defendant because the defendant had committed no felony in the bar or prior to King's alleged "citizen's arrest" of the defendant 100 yards from the Winner's Circle Bar. RA 135 (Worcester T&G 1-21-93) & PC 265-266. See App. 40a.

3. Indictment. In March of 1993 the Worcester D.A.'s Office rid themselves of all witnesses and exculpatory evidence produced at the probable cause hearing and indicted the defendant with the sole testimony of the alleged-victim and off-duty, out of jurisdiction Westborough police officer, Tom King. King's testimony before the Grand Jury was substantially the same as at trial, infra. RA 65. The defendant raised an issue in his motion for new trial that the Worcester DA's Office impaired the grand jury process. RA 65 (motion claim VIII).

4. *Trial & Conviction.* After a five-day trial, starting on 6-28-93, the jury convicted the defendant of the three charges before them after the deliberating for less than an hour. The charge of assault dangerous weapon was directed not guilty by the trial judge. RA 159 (docket 93-0135).

5. 10 (TEN)Year Prison Sentence & "Stay of Sentence". On 7-15-93 the defendant was sentenced to 10 (TEN) years in state prison on the assault with intent to maim charge ("attempted mayhem") and 1 year probation, on and after, on the two misdemeanor charges. RA 160 (docket entry 13). The defendant was then allowed to walk out the front door of the courthouse on a "stay of sentence pending appeal". RA 160 (docket entry 13). The stay was revoked 13 months later due to a false arrest that resulted in a disposition of not guilty on all charges at a trial. See Com. v. Elbery 9462-JC-3067 Worcester District Court.

6. Post Conviction. There was a direct appeal filed by the defendant's appellate attorney in July 1994. See Com. v. Elbery 38 Mass. App. Ct. 912. The defendant raised a claim in his "motion for new trial", RA 114, and its appeal, that his appellate attorney was ineffective in his assistance of counsel. On July 6, 1999 the defendant filed his Pro-se "motion for new trial" in Worcester Superior Court. The Worcester D.A.'s Office filed no response. That motion was denied by the motion judge, without evidentiary hearing, on 12-26-01, 2 1/2 years later. App. 39a. The defendant timely filed an appeal brief, docket 02-P-318, and reply brief with the Mass. Appeals Court regarding that denial. The trial judge had recused himself from the case.
The defendant was released from prison April 2002.

7. *"Waiver" of motion claims.* Both the motion judge, App. 25a, and the Mass. Appeals Court, App. 3a-4a,

waived the defendant's claims of prosecutorial misconduct and ineffectiveness of trial attorney due to a violation of a state procedural rule called the "Mass. issue waiver rule" also referred to as the "waiver doctrine". The "Mass. issue waiver rule" (hereinafter - "Mass. waiver rule") requires that those constitutional claims be raised on direct appeal or forever lost. Com. v. Chase, 433 Mass. 293, 297-299 (2001). See App. 26a & App. 5a-6a. Both did however, review the defendants claims of ineffective assistance of appellate counsel only to the extent the defendant claimed that the appellate counsel failed to raise ineffectiveness of trial counsel. App. 4a, & App. 27a, respectively.

The defendant alerted both the motion judge RA 114 and the Appeals Court, App. 41a, that none of his motion claims were waived because the defendant had a right to effective assistance of appellate counsel via the 14th Amendment. Evitts v. Lucey, 469 U.S. 387, 395-398 ('85).

B. The Prosecution admits the evidence of the extent and cause of the alleged victim's eye injury, which was the evidence used to convict the defendant of "assault with intent to maim" and "assault and battery", was perjury. DBr.- Arg. II & DRb. - Reply #3-#4-#5-#6 - RA 1-30.

The alleged victim and prosecution's witness-in-chief, Tom King, testified at trial as to the cause and extent of his eye injury. This evidence caused the defendant convictions for "attempted mayhem" (attempting to take out King's eye) and "assault and battery" and a 10 (TEN)-year prison sentence.

Tom King, alleged victim, testified he suffered these serious injuries to his eye. RA 2 (p. 2 of motion).

1. a **cut eyeball**, TR 204-1, 468-9.
2. a **lacerated eyeball**, TR 203-24, 385-12 440-15, 479-3.
3. **bleeding from his eyeball**, blood coming

out of his eye, TR 202-24, 203-1, 468-14.

4. **vitreous fluid** was leaking out of his eye, TR 202-24, 203-1, 468-14, 486-14.
5. King claimed **permanent eye damage**, TR 204-3, 204-10.
6. Repeated testimony by King that he **almost lost** his **eye**, TR 203-9, 469-17, 468-24, 405-15.
7. Eye blind, TR 203-3, 426-9, 468-11, 381-5, 202-2, 383-23, 437-10.

Five trial witnesses, all friends of King's, confirmed and enlarged this testimony by King about King's eye injury. RA 142-146, See App. 60a-66a.

As per RA 4, King claimed that these serious eye injuries were caused by repeated thumb gougings by the defendant, King testified,

> TR 201-17 - TR 202-14 "He (Elbery) took his thumb and jammed it into my eye. On the outside of my eye he jammed it in **almost behind the eye** and kept pushing the thumb in real hard. He (second thumbing) jammed that thumb back into my eye on the inside of my eye and kept pushing the thumb into my eye, TR 431-22, **harder** and **harder** and **harder** with his **thumb nail**, TR 432-5.

It is undisputed that King went to the hospital 10 minutes after the incident. RA 120 & App. 67a. King's treating physician, Dr. Arinella, authored an unreadable medical record, App. 67a, that undisputedly shows that the evidence produced at trial about the cause and extent of King's eye injury was a fabrication, i.e., perjury. That illegible and unintelligible medical record, App. 67a, was an exhibit at trial. Illegible medical records are inadmissible, Com. v. Baldwin, 24 Mass. App. 200, 203 ('87) and so are records containing unintelligible medical jargon. Com. v. Ennis, 2 Mass. App. 864, 865 ('74).

A year after trial, the defendant's appellate attorney had King's medical record, App. 67a, deciphered by Dr. Arinella's office through an investigator, RA 123 & App. 68a, and, in 1996, interpreted by a physician, Dr. Hull, RA 126-128 & App. 69a-71a. That appellate attorney would never present the resulting evidence he discovered, see below, either on direct appeal or the motion for new trial he was paid for in advance.

Upon review of the deciphering, App. 68a, of King's medical report, App. 67a, medical expert, Dr. Hull, disclosed that King sustained a superficial abrasion to his eyelid and a small conjunctiva (outmost mucous membrane covering the eye) laceration causing a "red eye" or inflammation. See App. 69a-71a. Dr. Hull discloses per affidavit, App. 69a-71a, that King's medical record reveals King's eye was not bleeding, not leaking vitreous fluid, and that King's eyeball was not cut or lacerated. Hull states, App. 69a-71a, that King's superficial injury was consistent with being poked in the eye, not repeated thumb gougings. But the jury never knew this was true extent of King's "injury". RA 1-30.

Per the readable deciphering of King's medical record, App. 68a, Dr. Arinella documented that King claimed that his "eye injury" was caused by "catching a finger in the eye". See interview sections of App. 67a and its deciphering, App. 68a. But the jury was never alerted that King had told his physician that was the real cause of injury. RA 1-30.

The defendant's trial attorney never challenged the perjury as to the cause and extent of King's eye injury nor did he present the true content of King's medical record to the jury. RA 1-30. No medical expert was at trial. RA 1-30. The defendant's trial attorney did make some comments in his closing argument, TR 1224, TR 1225, that showed he knew the real content of King's medical record without presenting that evidence to the jury. See App. 30a & 10a. Closing

argument is not evidence at trial. Com. v. Hoppin, 387 Mass. 25, 30, (1982).

The jury never knew that King only had a "red eye" from, as he admitted to his doctor, "catching a finger in the eye". RA 1-30. The defendant's trial attorney was ineffective, Strickland v. Washington, 466 U.S. 668 '84.

The prosecutor is responsible for all evidence at trial that he knew or should have known to be perjury. Brady v. Maryland, 473 U.S. 83, 86 ('63). It is presumed the prosecutor knew the perjury was presented at trial because he had possession of King's medical record. U.S. v. Agurs, 427 U.S. 97, 103-110.

> "A new trial is required if there is **any** reasonable **likelihood** that the prosecution's **knowing use of false evidence could have affected the judgment of the jury**". Com. v. Tucceri, 412 Mass. 401, 405, ftnt. 3. RA 16-20.

1. Prosecution admits the evidence was perjury but claims the jury could sort it out from the truth.

The D.A., per Commonwealth's brief, does not deny that the eye injury evidence at trial was perjury. App. 5a-20a. The D.A. never addressed the 4 pages of perjury by prosecution witnesses, App. 60a-66a. The D.A. agrees, CBr.-41(lines 1-9)/App. 18a, with Dr. Hull's affidavit showing that King only had a "red eye", caused from, as King told Dr. Arinella, "catching a finger in the eye". The D.A. agrees that Dr. Hull's affidavit accurately reflects the content of King's medical record and King's "injury" as produced by Dr. Arinella. CBr. 41 (1-9)/App. 18a. The D.A. never denies that Dr. Hull's affidavit reflects the true content of King's medical record. The D.A. instead claims that Dr. Hull's affidavit is cumulative evidence of King's medical record, CBr. 40 (18-23)/App. 18a & CBr. 41/App. 19a, because the jury had the medical record

and the D.A. claims it was legible. CBr. 40/App. 18a. In effect, the D.A. agrees King's eye evidence at trial was perjury, since Hull's affidavit and the medical record are the opposite of the prosecution's evidence at trial. The D.A. claims, CBr. 27-28 (line 13-21) /App. 9a-10a & CBr. 40-41/App. 18a-19a, that the jury should be "left to its fact finding function" to sort out "any discrepancy in the evidence as to the extent of King's eye injury" at trial because they had King's medical record. Thus admitting that King's medical record and the trial evidence were in opposite.

Because the jury could not read or understand King's medical record, App. 67a, although it, App. 67a, was an exhibit at trial, Dr. Hull's affidavit, App. 69a-71a, cannot be cumulative evidence.

2. Prosecutor admits he knew the content of medical record

Outrageously, the Commonwealth insists that the prosecutor, and defense counsel could read and understand King's medical records, CBr p.39-40/App. 17a-18a. The question is, how? This is another admission by the prosecution that they knowingly presented perjury to the jury, as King's medical report and the testimony at trial, App. 60a-66a, are opposite.

The prosecution had a duty to correct the perjury.

The Due Process Clause of the 14th Amendment mandates the prosecutor had a duty to correct the perjury at trial, App. 60a-66a, regarding King's injury, regardless of the readability of King's medical record. Giglio v. United States, 405 U.S. 150, 153 ('72). DBr-Arg. II p.19 & DRb p.16.

The prosecution has a duty to prove beyond a reasonable doubt every fact necessary to constitute the crime charged and facts that would otherwise mitigate criminal culpability. Mullaney v. Wilbur, 421 U.S. 684, 697-98 ('75), Com. v. Stokes, 374 Mass. 583, 590 ('87). RA 8 & 14. The prosecution used this false evidence to prove excessive force, specific intent,

and deadly force by the defendant and falsely defeat the defendant's claim of self-defense. Again, the prosecution violated the defendant's 14th Amendment Right to Due Process.

Where federal question was raised & passed state courts.

As above indexed, the defendant raised this claim of knowing use of perjury by the prosecution and related ineffective assistance of trial counsel in his motion claim I, II, III at Worcester Superior Court, RA 1-30. The motion court waived those claims, via the "Mass. waiver rule," ruling they should have been raised in the direct appeal. See App. 25a-27a.

The defendant appealed to the Mass. Appeals Court and first raised a claim, Argument I of his appeal brief, App. 41a, that he had a Constitutional Right under the Due Process Clause of the 14th Amendment to effective assistance of appellate counsel and that if this claim, or any claim, was missed by his appellate counsel then he, the defendant, had a right to raise all issues missed by the appellate counsel on a motion for new trial under Rule 30b of M.R.C.P.; in that same appeal argument the defendant reminded the court that factual issues not of the trial record could not be raised on direct appeal. In that appeal argument-I, App. 41a-43a, the defendant reminded the Appeals Court the evidence, App. 68a-71a, discovered by his appellate attorney a year after trial, proving that the evidence of King's injury, that convicted him, was perjury could not be raised on direct appeal because those facts did not appear on the trial record.

The defendant raised the claim that the prosecution knowingly used perjured evidence at trial as to the cause and extent of King's eye injury and that his trial attorney was ineffective, regarding the same evidence, in Argument II of his appellant's brief and in Arguments III, IV, V, VI of his reply brief. The

Appeals Court held that all claims of prosecutorial misconduct and ineffectiveness of trial counsel were waived, due to the "Mass. waiver rule", and should have been raised on direct appeal. App. 3a-4a.

C. The defendant raised claims the prosecution fabricated three events in order to justify the alleged victim's, King's, "citizen's arrest".

1. *Prosecution witnesses change their testimonies.* The defendant raised a motion claim X, RA 73-89, that the prosecution knowingly allowed their witnesses to change their probable cause hearing testimonies to inculpate the defendant at trial. At the PC hearing various witnesses testified the defendant was minding his business not bothering anyone, that it was the bartender that started the argument in the bar. The bartender apologized to the defendant on the witness stand for starting the argument. PC 111-3. These same witnesses testified it was the prosecution's alleged victim, King, who picked the fight with the defendant inside the bar and that it was King that had to be restrained while the defendant remained seated.

However, at trial these same witnesses testified the opposite (perjury). On appeal this claim was raised in DBr.-Arg. VI, see App. 50a-53a.

2. *The bottle assault.* In order to justify King's citizen's arrest, the prosecutor knowingly presented false evidence to the jury that the defendant used a bottle as a weapon inside the bar, motion claim VI-RA 46-58, & DBr. Arg. IV, see App. 45a-50a. The prosecution witnesses admitted at the probable cause hearing that the defendant did not use a bottle as a weapon. DBr. 35-36, See App. 45a-46a.

3. *A "girl" was injured.* The prosecution claimed the plaintiff injured a "girl," causing her to be stitched in the face after being cut by glass from a broken beer bottle. There was never a criminal charge for this. The

defendant raised a motion claim IV-RA 30-39, DRb. Reply #1, that this was another fabrication. See App. 53a-59a.

4. *Prosecutor lead witnesses.* The defendant claimed that the prosecutor lead his witnesses, without objection, in order to produce testimonies causing these various fabrications of evidence at trial. RA 21-24, RA 142-158.

Knowing use by the prosecution to obtain a conviction is a violation of the 14th Amendment's Due Process Clause. The prosecutor had a duty under the Due Process Clause of the 14th Amendment to correct that perjury at trial. Giglio, 405 U.S. 150, 153.

Both the motion judge, App. 26a-27a, and Appeals Court, App. 3a, decided that these claims of knowing use of perjury by the prosecution were waived due to the "Mass. waiver rule".

D. The Mass. Appeals Court's arbitrary decision on Mass. "citizen's arrest" law in order to evade Constitutional issues raised by the defendant.

1. *Trial.* At trial it was undisputed by the prosecutor, judge, and defense attorney that King acted as a citizen while pursing and stopping the defendant with no powers or jurisdiction of a police officer. DBr. p.28. It was also undisputed at trial that King never identified himself as a police officer. DRb. p.8 & App. 12a.

2. *Motion New Trial.* The defendant raised an issue in his motion for new trial, RA 39-46,motion claim V, that King had no right pursuing and stopping the defendant; that King's citizen's arrest was illegal. It is undisputed the defendant did not commit a felony prior to King's arrest of the defendant. App. 31a. In order to justify a citizen's arrest the citizen must point to a felony committed by the arrestee prior to the citizen's arrest. Com. v. Clairborne, 423 Mass. 275,

280 ('96). Further, Mass. law requires that the "in fact test" be passed to have a valid citizen's arrest. Com. v. Harris, 11 Mass. App. 165, 170 ('81). The "in fact test" requires that the felony allegedly justifying the citizen's arrest results in a felony conviction in a court of law. id. The defendant further argued that King's undisputed pursuit and stop of the defendant was a crime, not a citizen's arrest, and that the defendant was the victim. id.

The defendant raised constitutional issues in that claim V of his motion for new trial that both his trial and appellate counsels were ineffective for not raising this issue and that the prosecution deceived the jury to believe King's pursuit, stop, and assault of the defendant was perfectly legal instead of telling the jury King had no right under Mass. law doing so.

There was no citizen's arrest instruction at trial. App. 13a.

The motion judge decided that any claim of prosecutorial misconduct was waived, due to the "Mass. waiver rule," and should have been raised on the defendant's direct appeal, App. 25a-26a. The motion judge relieved the defense attorneys of ineffectiveness by deciding King did act legally as a citizen without giving any further explanation. App. 31a.

3. *Appeal.* The defendant appealed this issue, DBr.-Argument III, raising the same undisputed facts and the same law while also claiming that both his defense counsels were ineffective and the prosecution deceived the jury that King's citizen's arrest was legal.

Reversing their position at trial, the Commonwealth, via appellee brief, App. 13a-16a, argued that King was a police officer while he was drinking in the bar and during the underlying incident not a citizen. The prosecution argued that as an out of jurisdiction police officer King was entitled to the "relaxed standard" of the "in fact test" under Mass. law. Clairborne, 423 Mass. 275, 280. The "relaxed

standard" requires an out of jurisdiction police officer only have probable cause of a felony to make an arrest. id.

The Commonwealth argued that probable cause existed for King's "arrest" due to a "girl's" injury and an alleged bottle assault by the defendant inside the bar. App. 16a.

The defendant argued in reply, per Reply #2 - DRb. 7-8, that King could not be considered a police officer as a matter of Mass. law because it was undisputed he did not identify himself as an officer. App. 12a. Com. v. Moreira, 388 Mass. 596, 601, '83; that an out-of-jurisdiction, off-duty police officer is only a citizen with no police powers. Com. v. Kerr, 409 Mass. 284, 287, '91. And that because King was drinking in a bar, and concealed his identify as a police officer, he did not comply with the "responsible action of legitimate law enforcement" required for the "relaxed standard". Clairborne, 423 Mass. at 280. That the "relaxed standard" in *Clairborne* applies only to out of jurisdiction police while on duty. id.

The defendant, DRb. 9-11, further argued that even if you consider King a police officer, although he did not identify himself as such and was off-duty and out of jurisdiction, there was found to be No Probable Cause, PC 265-266 & App. 40a, of a felony for any of the conduct by the defendant before King's citizen's arrest. A probable cause finding is not appealable. Com. v. Juvenile, 409 Mass. 49, 51('91).

The D.A. documented in an 11-30-92 letter there was no probable cause of felony - "....reason for King's pursuit was defendant's alleged disorderly conduct in bar". DRb. p. 2 & RA 133.

It is undisputed that there were never any criminal charges brought regarding a girl being injured in the bar. King admitted at the probable cause hearing he did not know a girl was injured. PC 53-6, DRb. 10. The prosecutor admitted no probable cause of a felony, TR 133 -A.D.A. Ball-"there isn't a crime for that, not a felony for girl's cutting". DRb. 11.

The defendant replied, DRb. p. 10, that the indictment for "assault dangerous weapon" yielded no probable cause because King testified at trial that the defendant did not assault anyone with a bottle, App. 46a, and then told the grand jury the opposite. App. 47a. Thus the prosecution gained that indictment by fraud. Broussard v. Great A&P Teas Co., 324 Mass. 323, '49.

Federal Issues. As in his motion claim V, the defendant also claimed, DBr. 31, that the prosecutor violated the defendant's Due Process Rights under the Fourteenth Amendment because he deceived the jury to believe that King acted legally by pursuing and stopping the defendant; that the prosecutor had a duty to alert the jury that under Mass. law King had no right pursuing and "arresting" the defendant. "A lie is a lie and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth". Napue v. Illinois, 360 U.S. 264, 270 ('59). Deliberately deceiving a jury by presentation of known false evidence is incompatible with the rudimentary demands of justice. Giglio, 405 U.S. at 153. The defendant's defense at trial was self-dense.

First, the Mass. Appeals Court ruled that all claims of prosecutorial misconduct were waived, due to the "Mass. waiver rule," and should have been raised on direct appeal. App. 3a. This would include the prosecutor's misconduct relating to citizen's arrest.

The Mass. Appeals Court, App. 4a, addressed the citizen's arrest issue only to the extent of addressing ineffectiveness of the defendant's appellate attorney. The Mass. Appeals Court, App. 4a, simply agreed with the motion judge's decision on citizen's arrest, App. 31a, when they agreed with the motion judge's determination that the appellate attorney, to the extent of raising claims of trial attorney's effectiveness, was not ineffective. App. 37a. However, the motion judge found that King acted only as a

private citizen and made a legal citizen's arrest. App. 31a. The motion judge did not address the requirement under Mass. law that a citizen's arrest pass the "in fact test". As above, the D.A. argued that King acted as a police officer not a citizen, App. 13a-16a, the opposite of the motion judge. See II-B-"decision citizen's arrest", infra.

REASONS FOR GRANTING PETITION

I. The "Mass. issue waiver rule" is in direct conflict with the Supreme Court, *Evitts*, and the Due Process Clause of the Fourteenth Amendment.

The decisions of the Mass. Courts, supra, to waive, via the "Mass. issue waiver rule," the defendant's "motion for new trial" claims and their appeal are in direct conflict with the decisions of the Supreme Court of the United States, and the Due Process Clause of the 14th Amendment of the U.S. Constitution which holds the defendant has a right to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-98, ('85).

The state courts decided, App. 3a-4a & App. 25a-27a, that most of the defendant's claims and all of the defendant's claims of prosecutorial misconduct and ineffective assistance of trial counsel claims, as raised on the defendant's "motion for new trial" and its appeal, were waived and forever lost, due to a state procedural law called the "Mass. issue waiver rule", and should have been raised by the defendant's appellate attorney in the defendant's direct appeal. Com. v. Chase, 433 Mass. 293, 297-299 (2001) (citing Murch *v.* Mottram, 409 U.S. 41, 45, '72, to support the "Mass. waiver rule"). However, the Supreme Court of the United States held there is a Constitutional right under the 14th Amendment Due Process Clause

to effective assistance of appellate counsel. Evitts, 469 U.S. at 396. Failure to comply with state appellate procedures causes an appellate attorney to be ineffective in his assistance of counsel. Evitts, 469 U.S. at 392.

This waiver decision by the state courts resulted in no review of over a dozen motion claims the defendant raised on his motion for new trial that the state courts have decided should have been raised by the defendant's appellate attorney on direct appeal. All those dozen motion claims raised violations of the defendant's rights under the U.S. Constitution. Six of those waived motion claims that raised an issue that the prosecutor knowingly used perjury at trial to gain the conviction were also presented in the defendant's appeal of the denial of his motion for new trial. See Statement of Case, supra, for those six claims of prosecutorial misconduct also raised on the defendant's appeal of the denial of his motion for new trial.

An appellate attorney is ineffective when he fails to raise issues that would have resulted in a reversal of the criminal conviction. Gray v. Greer, 800 F2d 644, '85. Each of those waived motion claims would have resulted in a new trial, due to their meritorious showing that the defendant's Constitutional Rights to Due Process of Law were violated, and more specifically that the prosecutor knowingly used perjury at trial to obtain the conviction of the defendant. The best example of merit is that the prosecution knowingly used perjury as to the cause and extent of the victim's eye injury, see Statement of Case-B. A conviction must be set aside if there is any reasonable likelihood that perjury knowingly used by the prosecutor could have affected the jury verdict. U.S. v. Bagley, 473 U.S. 667, 678, ('85).

In Mass. there is a guaranteed right to a direct appeal of a criminal conviction. Rule 28c-MRCP. A direct appeal as of right must comport with the Due

Process Clause of the 14th Amendment. Evitts, 469 U.S. 393. The defendant had a Due Process right under the 14th Amendment to effective appellate counsel regarding his direct appeal. Evitts, 469 U.S. 396. If, as the state courts claim, his appellate attorney, on direct appeal, should have raised many the defendant's motion claims, then the defendant's appellate attorney was ineffective. The only place for the defendant to raise those claims missed by the appellate attorney, and raise a claim that the defendant's appellate attorney was ineffective in his assistance of counsel, is on a motion for new trial.

The defendant claimed his appellate attorney was ineffective in motion claim XVIII, RA 114. The defendant raised a claim that his appellate attorney was ineffective with each appeal argument that should or could have been raised on direct appeal. The state courts were reminded by the defendant, per motion claim XVIII, RA 114, and appeal argument-I, App. 41a, that there was no waiver of his motion claims due to *Evitts*.

By waiving the prosecutorial misconduct and ineffective assistance of trial counsel claims the state courts never addressed the defendant's most potent claim; that King's eye injury evidence at trial was knowing prosecutorial perjury. And that defendant's trial counsel was ineffective regarding that same eye evidence in violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668 ('84). The state courts reviewed the performance of the defendant's appellate counsel to the extent that the defendant's trial attorney was ineffective, but the defendant never raised a claim that his appellate attorney was ineffective regarding King's eye injury evidence. The appellate attorney could not be held responsible for that claim on direct appeal because the evidence, App. 68a-71a, through his investigation came more than a year after the trial. Factual claims not appearing on the trial record must be raised on a

motion for new trial. Com. v. Adamides, 37 Mass. App. Ct. 339, 344 ('94).

The state's decision to waive the defendant's motion claims based on Mass. procedural law, the "Mass. issue waiver rule," is in conflict with *Evitts* and the defendant's Constitutional Rights to Due Process per the 14th Amendment that guarantees the defendant effective assistance of appellate counsel. Evitts, at 396. Per *Evitts*, none of the defendant's 18 motion claims, which were all constitutionally grounded, should have been waived. RA 1-115 & App. 41a. Because the Mass. "waiver rule" is unconstitutional those waived motion claims should be reviewed resulting in a reversal of the jury's verdict and a new trial because of ineffective assistance of trial counsel and prosecutorial misconduct.

The "Mass. waiver rule" causes a defendant to lose, forever, constitutionally grounded claims that the appellate counsel fails to raise on direct appeal. As per App. 25a-27a & App. 5a-6a, the "Mass. waiver rule" has been used for decades in Massachusetts causing an injustice to criminal defendants , whereby, their right under the 14th Amendment's Due Process Clause to effective assistance of appellate counsel is ignored. See Com. v. McLaughlin, 364 Mass. 211, 229 (1973)(citing cases back to the 1920's that used the "Mass. waiver rule" or "waiver doctrine"). See also App. 6a, the Commonwealth citing U.S. v. Agurs, 427 U.S. 97, as legal support for the "Mass. waiver rule."

II. The state courts violated their own laws in order to evade the defendant's claims that his Constitutional Rights under the Due Process Clause of the 14th Amendment U.S. Constitution had been violated.

A. Factual claims not on the trial record not treated "even handedly."

The state courts violated their own procedural law by waiving, via the "Mass. waiver rule," the defendant's motion claims. App. 3a-4a. Some of those motion claims waived by the state courts presented factual claims of prosecutorial misconduct and ineffectiveness of trial attorney that were grounded on facts not appearing on the trial record making it impossible to raise those claims on direct appeal. Those claims include motion claims I, II, III, RA 1-30, argument II on appeal, see Statement of Case - B, supra, showing that the prosecution knowingly presented perjury at trial regarding the victim's cause and extent of eye injury and that the defendant's trial attorney was ineffective regarding this same eye injury evidence.

1. *Raising Factual claims not on trial record.* In Mass., a direct appeal of a criminal conviction may only raise factual issues that appear on the trial record. White v. White, 662 NE2 230, 232, 40 Mass. App. Ct. 132, 133 ('96) & MRAP-Rule 8 (record of lower court is record for appeal). "Constitutional arguments raised by the petitioner that are based on factual questions are best left for resolution in the first instance by a trial judge on a motion for new trial". Gibney v. Comm., 375 Mass. 146, 148, 375 NE2 714 ('78). This Massachusetts law is not surprising since an appeals court is a court of review. DBr. Arg. I. See App. 42a-43a.

2. *Knowing use of Perjury by Prosecutor.* Mass. law further requires that factual claims, specifically relating to non-disclosure type prosecutorial misconduct claims, should be raised on a motion for new trial via Rule 30b of the MRCP. There is no reason why claims of prosecutorial misconduct (non-disclosure type claim) could not be advanced by a motion for new trial to which the regular principles of MRCP 30b apply. "Even if an undisclosed evidence is not "newly discovered", the failure of a prosecutor to furnish exculpatory evidence in his possession is a proper basis for a new trial motion based on common law or constitutional grounds". Tucceri 412 Mass. 408-409. DBr. Arg. I. See App. 42a.

3. *Ineffective Assistance of Counsel.* "When the trial record provides an insufficient factual basis for appellate review, the claim of ineffective assistance of trial counsel is best left for resolution in the first instance by the trial judge in a motion for new trial." Com. v. Adamides, 37 Mass. App. Ct. 339, 344 ('94). See App. 43a.

Regardless of its unconstitutionality, the "Mass. issue waiver rule" has never been used by the Mass. courts to exclude "factual claims" that did not appear on the trial record from being reviewed on a motion for new trial.

State procedural requirements, which are not strictly or regularly followed, cannot deprive the Supreme Court of the right to review. Barr v. City of Columbia, 378 U.S. 146, 149 (1964). State procedural requirements not applied evenly do not constitute an adequate state ground barring Supreme Court review of the federal issue. id.

The state courts cannot violate their own law in order to evade the defendant's Constitutional Rights and deny Due Process of Law. "Due Process includes enforcement of state rights, as well as, federal rights-state procedure can never be independent of the requirements of Due Process". Wright, Miller, Cooper,

Federal Practice and Procedure, Vol. 16B, 2d Ed. 1996, 16B p. 375.

The defendant's factual claims that could not be raised until a motion for new trial should be reviewed. This would include all motion claims appealed by the defendant with the exception of "citizen's arrest" which was a strictly legal issue.

B. Decision - "Citizen's Arrest"

The decision of the Appeals Court on citizen's arrest, App. 4a, was arbitrary and ambiguous and provided no adequate and independent state-law ground for its decision on the defendant's claim that King did not act legally via his arrest. Although lacking much discussion, per App. 4a, it appears that the Appeals Court agrees with the motion judge's finding that King acted only as a citizen and that King's citizen's arrest was legal. App. 31a. That finding by the motion judge is in conflict with the D.A. who claims King acted as a police officer and was entitled under Mass. law to be treated as such. App. 15a-16a.

Regardless, the Appeals Court, App. 4a, found against the defendant's citizen's arrest argument, which also claimed that King acted only as a citizen as a matter of Mass. law, see Statement of Case - D. Since the Appeals Court is agreeing with the defendant that King acted as a citizen, and it is undisputed King failed the "in fact" test required by Mass. law, that makes King's arrest and the conviction of the defendant illegal. Com. v. Harris, 11 Mass. App. 170. Ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by the Supreme Court of the validity under the federal constitution of state action. Michigan v. Long, 463 U.S. 1032, 1041, '83.

By denying the defendant's citizen's arrest claim the Appeals Court has changed the law of citizen's arrest for the purpose of the defendant's appeal via that unpublished decision. Mass. citizen arrest law remains as it was, per published opinions,

for decisions of future cases. That makes it an arbitrary decision of state law that resulted in evading the defendant's federal claim that the prosecutor had deceived the jury that King's arrest of the plaintiff was perfectly legal rather than an assault on the defendant, and that the defendant's attorneys were ineffective regarding citizen's arrest. The Appeals Court decision on citizen's arrest lacks fair or substantial support via precedent state law or reason causing it to be inadequate resulting in a violation of Due Process, Ward v. Board Cty. Commrs. of Love Cty, 253 U.S. 17, 22-23, 1920; and in effect an evasion of federal law. In Memphis Nat. Gas Co. v. Beeler, 315 U.S. 649, 653-654, 1942.

The requirement of adequacy applies to substantive as well as procedural state law. Coleman v. Thompson, 501 U.S. 722, 729 ('91). The adequacy of the state-law ground to support a judgment precluding litigation of the federal claim is itself a federal question which the Supreme Court may review de novo. Howlett v. Rose, 496 U.S. 356, 366 ('90). The state ground, to be adequate, must also be a tenable one. In other words Supreme Court review cannot be evaded by reliance on a state ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question". Lawrence v. State Tax Commission, 286 U.S. 276, 282 (1932). The Mass. Appeals Court's arbitrary and irregular application of citizen's arrest law cannot prevent review by the Supreme Court of the underlying federal issue that the prosecutor deceived the jury that King's pursuit and stop (arrest) of the defendant was perfectly legal. Staub v. City of Baxley, 355 U.S. 313, 318-319 ('58). (Supreme Court will review nonfederal ground, which defeats the enforcement of federal rights).

The defendant's claim that King's citizen's arrest was actually a false arrest and assault and battery on the defendant and the related

constitutional issues, see Statement of Case - D should be reviewed resulting in a new trial. Since King had committed a false arrest the alleged evidence of assault by the defendant should have been suppressed. Com. v. LeBlanc 407 Mass. 70, 75 (1990). The suppression would result in no evidence of a crime; this causing the conviction to be a violation of the 14th Amendment's Due Process Clause. Thompson v. City of Louisville, 362 U.S. 199, 200 (1960).

III. There has been a gross miscarriage of justice.

The Mass. Appeals Court referred to page 20-43 of the Commonwealth's brief, in making their decision. See App. 3a-4a.

As per Statement of Case-B, supra, the Commonwealth, per appeal brief, agreed that the evidence of King's injury, used to convict the defendant was medically documented perjury, and the prosecutor knew it. The perjury regarding King's injury was huge not slight. The Commonwealth, per that appeal brief-App. 10a, claim it was permissible to leave the perjury (D.A. calls perjury a discrepancy) presented at trial to the jury's fact-finding function and have the jury sort out the perjury.

The jury was never presented any evidence or testimony at trial that allowed them to know the content of King's medical record. They were only presented the prosecution's perjury. RA 1-30.

Had the jury not been deceived about Mass. citizen's arrest law they would have learned that the defendant was the victim. Supporting the defendant's defense of self-defense.

The Mass. Appeals Court was alerted to this miscarriage of justice.

That decision by the Mass. Appeals Court violates *Brady* and progeny that holds that knowing use of perjury by the prosecution at trial is a violation of the Due Process Clause of the Fourteenth Amendment. U.S. v. Agurs, 427 U.S. 97, 103. The prosecutor is responsible for all evidence at trial that he knew or should have known to be perjury. id. The prosecutor has a duty to correct all perjury known to them at trial. Giglio v. United States, 405 U.S. at 153.

Conclusion: The writ of certiorari should be granted. There has been a miscarriage of justice - the conviction of Michael Elbery should never have happened in a U.S. courtroom. The Massachusetts courts arbitrarily used state law to evade the defendant's post-conviction constitutional issues. The Massachusetts courts for decades have used the state procedural "Mass. issue waiver rule" to eliminate criminal appellant's Due Process Right to effective assistance of appellate counsel, in direct conflict with Supreme Court law, resulting in years of mass injustice. In Massachusetts, due to the use of the "Mass. issue waiver rule," the criminal appeal procedure continues to be a meaningless ritual not protected by Due Process of Law.
In view of the conflict of the decision below with past decisions of this Court, the Court may wish to consider a summary reversal.

Respectfully submitted,

Michael Elbery, pro se
168 Fairfield St.
Needham, Mass. 02492
781-444-7324
August 1, '03

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APPENDIX A

Supreme Judicial Court for the Commonwealth of Massachusetts
1412 Courthouse, Boston, Massachusetts 02108
(617) 557-1020

Michael G. Elbery
168 Fairfield Street
Needham, MA 02492

RE: Docket No. FAR-13357

COMMONWEALTH
vs.
MICHAEL G. ELBERY

Worcester Superior Court No. W0CR1993-00 135
A.C. No. 2002-P-0318

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 06/05/03, the above-captioned Application for Further Appellate Review was denied.

Susan Mellen, Clerk

Dated: June 5, 2003

To: Harry D. Quick, III, A.D.A.
Michael G. Elbery

APPENDIX B

COMMONWEALTH OF MASSACHUSETT'S
APPEALS COURT
CLERK'S OFFICE
1500 NEW COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8106

May 1, 2003

Michael G. Elbery
168 Fairfield Street
Needham, MA 02492

RE: No. 2002-P-0318
COMMONWEALTH
vs.
MICHAEL G. ELBERY
NOTICE OF DOCKET ENTRY

Please take note that, with respect to the Notice of withdrawal of petition for rehearing, filed by Michael G. Elbery. (Paper #31),

on May 1, 2003, the following order was entered on the docket of the above-referenced case:

RE#31 Noted. As the petition has been withdrawn, no further action will be taken on the petition. (Laurence, Gelinas, Mills, JJ.) Notice.

Very truly yours,

The Clerk's Office
Dated: May 1, 2003

To: Harry D. Quick, III, A.D.A.
Michael G. Elbery

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

02-P-318

COMMONWEALTH
vs.
MICHAEL G. ELBERRY.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

We affirm the motion judge's denial of Elberry's motion for a new trial and request for an evidentiary hearing. The facts in this case are set forth in succinct manner in our decision affirming the defendant's conviction on direct appeal. Commonwealth v. Elberry, 38 Mass. App. Ct. 912 (1995). The motion judge determined that certain of the defendant's claims, (claims of judicial misconduct, prosecutorial misconduct, inadequate jury instructions, errors in the admission of evidence, errors in sentencing, and claim that the verdicts were against the weight of the evidence), were waived, as they had not been raised in his direct appeal. For the reasons and upon the authorities set forth in the motion judge's memorandum of decision, and in the Commonwealth's brief, especially at pages twenty through twenty-three, we agree that the defendant's claims were waived by his failing to raise them in his direct appeal.

In his motion, Elberry also claimed ineffective assistance of both his trial and appellate counsel.

[1] Although the defendant, in his pro se brief, spells his name "Elbery," we follow our editorial convention of adhering to the spelling in the indictment.

The motion judge found that he had waived any claim to ineffective assistance of trial counsel, again, because that claim was not raised in his direct appeal. We agree. See Commonwealth v. Chase, 433 Mass. 293, 298-299 (2001).

With regard to the defendant's claim of ineffective assistance of appellate counsel, the motion judge appropriately reviewed the trial record to determine whether trial counsel was in fact ineffective and thus appellate counsel would have been ineffective if he failed to raise trial counsels ineffectiveness on appeal. Our review of the trial record leads us the same conclusion as that reached by the motion judge: that trial counsel was not ineffective, and therefore appellate counsel had no reason to raise the issue on direct appeal.

For the reasons and upon the authorities set forth in the motion judge's memorandum of decision, and for those set forth in the Commonwealth's brief, especially at pages twenty-three through forty-three, we affirm the motion judge's denial of the defendant's motion in this regard. We further conclude that there was no abuse of discretion in the motion judge's refusal to grant an evidentiary hearing, as the defendant raised no substantial issue. See Mass.R.Crim.P. 30(c)(3), 378 Mass. 901 (1979).

Order denying motion for new trial affirmed.

By the Court (Laurence, Gelinas & Mills, JJ.),

Clerk

Entered: March 10, 2003.

APPENDIX D

Argument.

The Motion Judge Properly Denied Defendant's Motion for New Trial Without a Hearing, Where Defendant Did Not Raise a Substantial Issue With an Adequate Factual Basis to Show that a Substantial Risk of a Miscarriage of Justice Occurred.

Proceeding pro se, defendant moved for a new trial under Mass. R. Crim. P. 30(b). In his motion defendant asserted, inter alia, that the trial prosecutor engaged in misconduct, that the jury charge was inadequate, and his trial and appellate counsel were ineffective. (R.A. 1-115). The motion judge denied this motion, ruling that defendant's claims of prosecutorial misconduct and inadequate jury instructions were waived and that defendant did not present adequate evidence entitling him to a hearing on his ineffective assistance of counsel claims. (Def. Addendum 1- 18). On appeal, defendant claims that the motion judge erroneously denied his motion without a hearing because his claims were not waived and they evinced a substantial risk of a miscarriage of justice. Because defendant's claims could have been raised in his direct appeal, the motion judge correctly determined that they were waived. Because defendant provided no factual basis to show that a substantial risk of a miscarriage of justice occurred, **[20]** the motion judge properly denied defendant's motion without a hearing.

"'A motion for new trial may not be used as a vehicle to compel . . . review and [consideration of] questions of law,' on which a defendant has had his day in an appellate court, or [on which he has] foregone that opportunity." Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994), cert. denied ___ U.S. __, 115 S.Ct. 753 (1995) (quoting

Commonwealth v. Watson, 409 Mass. 110, 114 (1991)). This rule of waiver "applies equally to constitutional claims which could have been raised but were not raised on direct appeal . ." Commonwealth v. Amirault, 424 Mass. 618, 641 (1997) (citations omitted). Where, as here, "there has been appellate review of a conviction . . a judge considering a motion for new trial should first exercise discretion to deal with the substance of any issue presented." Commonwealth v. Curtis, 417 Mass. 619, 634 n.14 (1994). "The trial judge's discretionary power to give relief. . . should be exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." Id. at 626. Defendant has advanced no **[21]** reasons to circumvent the waiver rule.

First, the motion judge properly determined that defendant's claim of prosecutorial misconduct was waived. Defendant's assertions that the prosecutor withheld information and allowed perjury rest on defendant's comparison of the trial testimony with the probable cause and grand jury testimony and the medical records submitted into evidence. (D.Br. 15-49). Because this evidence was clearly available to defendant and the law in this regard had been clearly established, see United Stated v. Agurs, 427 U.S. 97 (1976) and its progeny, this claim should have been raised on direct appeal. See Amirault, 424 Mass. at 642. Failure to do so constitutes waiver and, as discussed below, see part A. infra, defendant has not demonstrated a miscarriage of justice, which would justify relief from the waiver doctrine.

Second, defendant asserts errors in the trial judge's instructions on consciousness of guilt and assault with intent to maim. (D.Br.. 32). Defendant raised the adequacy of these instructions in his direct appeal and this Court correctly determined that these unobjected-to instructions were not erroneous and did not create a substantial risk of a miscarriage **[22]**

of justice. Commonwealth v. Elberry, 38 Mass. App. Ct. 912, 912 (1995) Thus, the motion judge correctly exercised his discretion to decline to consider these claims. See Gagliardi, 418 Mass. 562, 565-67 (1994).

Third, in his motion for new trial, defendant asserted that his appellate counsel was ineffective for failure to raise certain claims of ineffective assistance of trial counsel. The motion judge did not deem these claims waived and assessed whether appellate counsels decisions not to make certain arguments amounted to ineffective assistance of counsel. (Def. Addendum 6-18). Regardless of whether these ineffective assistance claims are waived, the same standard effectively applies, "because, if an omission of counsel does not present a substantial risk of a miscarriage of justice . . . there is no basis for an ineffective assistance of counsel claim under either the Federal or the State Constitution.'" Commonwealth v. Young, 56 Mass. App. Ct. 60, 62 (2002) (quoting Curtis, 417 Mass. at 624 n.[4] Based on **[23]** these standards, the motion judge

[4] To prevail on a motion for a new trial which alleges ineffective assistance of counsel, a defendant bears the burden of demonstrating that his trial attorneys conduct fell "measurably below that which might be expected from an ordinary fallible lawyer--and, if that is found, [that] it has deprived [him] of an... otherwise available, substantial defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). Such proof requires the defendant to show that "better work might have accomplished something material for the defense." Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). "Where the defendant challenges counsels tactical or strategic decisions, he must establish that such decisions are not merely unreasonable, but manifestly unreasonable.'" Commonwealth v. Adams, 374 Mass. 722, 728 (1978) (citation omitted). The 'defendant bears a heavy burden in establishing ineffective assistance of such magnitude as to entitle him to a new trial," Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 631 (1992), rev'd on other grounds, 416 Mass. 97 (1993), and will not be permitted to "characterize as unreasonable a defense that was merely unsuccessful." Commonwealth v. Montanez, 410 Mass. 290, 295 (1991). See also Commonwealth v. White, 409 Mass. 266, 272 (1991).

properly denied defendant's new trial motion without a hearing because defendant did not show that a substantial risk of a miscarriage of justice occurred.

"Whether to hold a hearing on a motion for post-conviction relief or to consider it solely on the basis of affidavits and other supporting material is a decision which rests in the sound discretion of the judge, based on a determination whether the motion and affidavits raise a substantial issue." Commonwealth v. McGann, 20 Mass. App. Ct. 59, 62, rev, denied, 395 Mass. 1102 (1985) "'In determining whether a 'substantial issue' meriting an evidentiary hearing... [24] has been raised, [appellate courts] look not only to the seriousness of the issue asserted, but also to the adequacy of the defendant's showing on the issue raised." Commonwealth v. Devincent, 421 Mass. 64, 68 (1995). The motion judge exercised proper discretion when he declined defendant's request for a hearing because defendant did not meet his burden of establishing an adequate factual basis to support his allegations.

A. The motion judge properly denied defendant's motion for new trial without a hearing, where defendant did not present any evidence to show that the prosecutor deliberately deceived the jury in any manner or that trial counsel was ineffective.

Citing to discrepancies between the trial testimony of the victim and the other witnesses, as well as to the victim's and witnesses' trial testimony as compared to their probable cause and grand jury testimonies and statements in medical records, defendant asserts that the prosecutor knowingly and deliberately allowed the introduction of false testimony at trial, thereby violating defendant's

constitutional right to due process of the law.[5] **[25]** (D.Br. 15-25, 35-49). He further asserts that his trial counsel was ineffective for failure to address these issues at trial. (Id.). Because defendant provided no evidence to demonstrate that the prosecutor deliberately withheld evidence and knowingly allowed perjured testimony/ the motion judge properly denied defendant's motion for new trial without a hearing on this matter.

It is true that where the prosecutor intentionally introduces false testimony or remains silent when he or she should have known of the perjured testimony that a defendant's constitutional rights to due process are violated. Agurs, 427 U.S. **[26]** at 103; Napue v. Illinois, 360 U.S. 264 (1959); Commonwealth v. Collins, 386 Mass. 1, (1982). Nevertheless, that discrepancies exist between the witnesses' testimonies, without more, does not demonstrate such prosecutorial misconduct. Commonwealth v. Sullivan, 410 Mass. 521, 532 (1991). Particularly, where as here, the alleged discrepancies were placed before the jury by both the prosecutor and defense

[5] Defendant's claims are numerous in this, regard: by comparing the victim's trial testimony to that of the other witnesses and the medical records, which were admitted into evidence by the prosecutor, defendant asserts that the prosecutor allowed the victim to falsely testify regarding the extent of his eye injury (D.Br. 15-25); by comparing the victim's trial testimony and probable cause testimony, defendant argues that the prosecutor knowingly allowed the victim to falsely testify that defendant had waved the jagged bottle at the bartender and the rest of the patrons (D.Br. 35-40); by taking the prosecutor's statement out of context, defendant states that the prosecutor knew King was drinking on duty and allowed King to testify to the contrary (D.Br. [4] 1-43); by comparing various witnesses' testimony at the probablethe prosecutor knowingly allowed perjury (D.Br. 44-49); and defendant asserts that knowing that King's purported citizen's arrest of defendant was unlawful, the prosecutor improperly introduced evidence that there was a valid citizen's arrest (D.Br. 25-35).

counsel, defendant did not meet his burden to show that there was any deception on the part of the prosecutor. See Sullivan, 410 Mass. at 521 ("'simply because a witness alters some portion of his testimony at the time of trial is not sufficient reason to conclude that the new testimony was false, or that the Commonwealth knew or had reason to know that it was false.'") (quoting Commonwealth v. McLeod, 394 Mass. 727, 743, cert. denied, 474 U.S. 919 (1985)).

First, there is no evidence that the prosecutor acted improperly. With respect to King's eye injury, King testified at trial that he felt blood and vitreous fluid coming from his left eye after defendant had twice jammed his thumbnail into King's eye. (TR.II 201-03). King testified that as a result he received a laceration or cut on his eyeball. **[27]** (Tr.II 203-04). The prosecutor introduced into evidence King's medical records, which show that King did suffer a laceration. (R.A. 120). Thus, the records validate King's testimony.

Second, at trial, defendant's counsel argues that that the medical records indicated that King suffered from a "superficial abrasion," (Tr.V 1224-25), and that if defendant had gouged at King's eye in the way he claimed, then King would not have an eye. (Id.). Thus, any discrepancy in the evidence as to the extent of King's eye injury was before the jury; the prosecutor did not deceive them, and trial counsel did not sit by passively. Rather, the jury was left to its fact-finding function to determine whether defendant did commit assault with intent to maim by trying to gouge out Mr. King's eye. See Sullivan, 410 Mass. at 532 ("a prosecutor may marshal the evidence for or against the credibility of the witness, and allow the jury to determine whether the witness is telling the truth."). There is no evidence that the prosecutor acted improperly in this regard.

Similarly, the prosecutor did not improperly elicit false testimony that defendant assaulted King and the other bar patrons with the jagged edge of a **[28]** bottle,

and counsel was not ineffective for failure to bring this matter to the jury's attention. At trial, Mr. King testified that after smashing the bottle, defendant waved the jagged edge of it at the bartender and the other patrons. (Tr.I 192). Any discrepancies between this and other testimony were highlighted by both the prosecutor and defense counsel. (See e.g. Tr.I 301-03, 308-10). Defendant presented no evidence to show that the prosecutor knew King's trial testimony was false and the prosecutor was not required to independently assess King's credibility on that score. Sullivan, 410 Mass. at 532; Commonwealth v. Zuluaga, 43 Mass. App. Ct. 629, 646 (1997) ("[t]hat a prosecution witness contradicted herself is insufficient to show that the Commonwealth knowingly used perjured testimony."). Furthermore, defense counsel also elicited testimony from King that he was not placed in fear by defendant's display of the bottle because defendant could not have reached him. (Tr.II 310). Counsel's examination was so successful that the trial judge directed a verdict of not guilty on the assault with a dangerous weapon charge. (Tr.IV 850). There being no prosecutorial misconduct or **[29]** ineffective assistance in this regard, defendant's claims fail.

Likewise, defendant's comparison of every miniscule discrepancy between the various witnesses, trial and probable cause testimony (D.Br. 15-25, 35-49), does not show that the prosecutor elicited false trial testimony from them or deliberately presented an incorrect theory of the case. Sullivan, 410 Mass. at 532; Zuluaga, supra.

Next, by taking a passage of the trial transcript out of context, defendant asserts that the prosecutor deliberately deceived the jury by allowing Thomas King to testify that he was not drinking on duty. (D.Br. 41-43). He further asserts that his trial counsel was ineffective as he sat by passively during this conduct. (Id.). Because defendant's version of events simply did not occur, his claim fails.

The prosecutor did not state that he believed Thomas King was drinking on duty. Rather he stated, in essence, that defense counsel was making this allegation and he wanted to rebut it. Through cross-examination, trial counsel attempted to imply that the reason King had not identified himself as a police officer that night was because he was inebriated and **[30]** drinking on duty. (Tr.II 235-237, 285-86, 395, 406-09). To rebut this claim, the prosecutor sought to introduce King's statement contained in the medical records to hospital personnel that he was a police officer. (Tr.II 448-452). Trial counsel opposed this and the following transpired at side bar:

> The Court: I don't understand how the identification of himself as a police officer is corroboration or that the memorial hospital [record] is pertinent to this at all.
>
> [The Prosecutor]: Because of the allegation that was made by -
>
> The Court: He didn't identify himself at the scene.
>
> [The prosecutor): Reason he didn't do that is because he was drinking on duty.
>
> The Court: He already said that he told them at the hospital that he was [a police officer].

(Tr.II 452). As is evident from the transcript, the judge interrupted the prosecutor midstatement; after this interruption, the prosecutor continued his assertion that he wanted in evidence King's statement to hospital personnel that he was a police officer in order to rebut trial counsel's implication that King did not

identify himself as such because he was drinking on duty. **[31]**

Furthermore, trial counsel vigorously pursued the idea that Mr. King was drinking on duty and inebriated. Counsel cross-examined Mr. King at length on this point, (Tr.II 234-38, 386, 406-09), and called John Hayes who testified that Mr. King was intoxicated when he entered the car to go to the hospital. (Tr.IV 917). Trial counsel also argued in summation that King was drinking on duty and that he did not reveal his position because he was inebriated. (Tr.V 1208-12 11). Thus, contrary to defendant's arguments, the prosecutor never stated that Mr. King was on duty when he was drinking at the bar, and trial counsel did pursue this point.

In sum, defendant did not raise a substantial issue with an adequate factual basis to show that the prosecutor engaged in deliberate deception or that trial counsel was ineffective for allowing this deception. Accordingly, the motion judge properly denied defendant's motion without an evidentiary hearing.

B. Counsel rendered effective assistance when he opposed giving of a citizen's arrest Instruction to the jury, where the evidence did not warrant such an Instruction. [32]

Defendant next argues that his counsel was ineffective for failure to request a so-called "citizen's arrest" instruction, on the theory that Mr. King, an off-duty police officer out of his jurisdiction, used force to effectuate an arrest of defendant. (D.Br. 25-35).[6] As the trial judge and defense counsel

[6] The prosecutor did pursue this theory at trial on the basis that King could have effectuated a valid citizen's arrest of defendant because King witnessed an assault and battery with a dangerous weapon on Ms. Mann, and defendant assaulted Mr. King and the other people in the bar with a dangerous weapon. The trial judge directed a verdict on the assault with a dangerous

determined, the instruction was not warranted, therefore, counsel was not ineffective for failure to request the instruction.

A prerequisite to an instruction on citizen's arrest is that the "citizen" use force to effectuate the arrest. See Model Jury Instructions for Use in *Superior* Court, §3.16.2 (1999) (citing Commonwealth v. Klein, 372 Mass. 823, 830-31 (1977)). No view of the evidence established that King used force to effectuate an arrest. **[33]**

The Commonwealth's evidence showed that defendant threw at least one punch at King and then King wrestled with defendant. (Tr.II 200-01). Knowing that he was out of his jurisdiction, King never intended to physically touch, arrest, or restrain defendant but instead followed him in order to inform the police of defendant's whereabouts. (Tr.II 213, 386-93). King simply told defendant that he was not going anywhere until the Worcester Police arrived because defendant had hurt a woman in a bar. (Tr.II 199, 219). King used no force on defendant. (Tr.II 200-01, 213, 393). At this point, defendant threw several punches at King, one of which connected. (Tr.II 200). King then put his arms around defendant in an effort to stop defendant from continuing his assault. (Tr.II 201). Defendant jammed his thumb into King's eye. (Id.). Mr. King eventually pulled the thumb out and tackled defendant to the ground in an effort to stop the assault. (Tr.II 20 1-02). Defendant then stuck his thumb back into Mr. King's eye. (Tr.II 202). Mr. King pulled defendant's thumb out and rolled away from defendant. (Tr.II 202) Because King did not use force on defendant to **[34]** effectuate an arrest, the instruction on citizen's arrest was not warranted.

weapon charge. (Tr.IV 850). Defendant was not indicted for assault and battery with a dangerous weapon as Ms. Mann's identity and whereabouts were unknown until one month before the trial of this matter. (Tr.I 248-254).

By contrast, defendant testified that King decided he was going to give defendant "a whooping" when he saw defendant yell at Jeff Schlener. (Tr.IV 1035). King, with two individuals "flanking" him, then approached defendant. (Tr.IV 1036-37). One of the individuals then started wrestling with defendant, who accidentally broke a beer bottle in the affray. (Tr.IV 1039-40). Defendant then ran out of the bar with a "gang" pursuing him. (Tr.IV 1044-45). King and another then tackled defendant and a tussle ensued. (Tr.IV 1048). When defendant was subdued and on the ground, King went over to defendant and gouged him in the eye. (Tr.IV 1056). Thus, defendant's version of events does not establish that King was trying to make a citizen's arrest, but, if believed, simply established King as the initiator of combat.

Accordingly, the trial judge correctly labeled this a "classic self-defense" case. (Tr.II 216). A citizen's arrest instruction not being warranted, counsel was not ineffective for failure to ask for one. See Commonwealth v. McCormick, 48 Mass. App. Ct. 106, 109-10 (1999) (counsel not ineffective for **[35]** failure to request limiting instruction, where instruction would have been inappropriate or the request for one denied), rev. denied, 430 Mass. 1113 (2000).

Even if the evidence supported a citizen's arrest instruction, defendant's cause would not have been aided if the judge had given it. Defendant asserts that as a matter of law, King's citizen's arrest was unlawful because defendant had not in fact been convicted of a felony. (D.Br. 25-35). Defendant is incorrect.

"A private citizen may lawfully arrest someone who has in fact committed a felony. (Generally the 'in fact committed' element must be satisfied by a conviction.)" Commonwealth v. Claiborne, 423 Mass. 275, 280 (1996) (parenthetical in original). This requirement, however, is relaxed in the case of a police officer acting out of his jurisdiction. Id. at 280-81. In that case, only probable cause is required to arrest. Id. The evidence clearly established that Mr.

King, a Westboro Detective, had probable cause to arrest defendant for the commission of a felony, either assault and battery with a dangerous weapon or assault with a dangerous weapon. See Model Jury **[36]** Instructions for Use in Superior Court, (1999), 2.20, 2.22.2 (outlining the elements of these offenses).

Mr. King witnessed defendant smash a beer bottle up against a pole or on the bar with patrons in the vicinity. Pieces of flying glass cut Ms. Mann above and below her eye, causing her to bleed and receive butterfly stitches in that area. After shattering the base of the bottle, defendant held the bottle in a jabbing manner toward the bartender and, other patrons. This evidence "was 'sufficient to warrant a person of reasonable caution in believing that the defendant had committed . . . a crime.'"[7] Claiborne, 423 Mass. at 281 (quoting Commonwealth v. Gullick, 386 Mass. 278, 283 (1982)). Because the evidence established that probable cause existed for Mr. King to arrest defendant, the omission of the citizen's arrest instruction had a minimal effect, if any, upon the jury, and counsel was not ineffective for failing to seek the instruction. **[37]**

Defendant also claims that his counsel was ineffective for failure to move to suppress all the evidence gained as a result of the purported unlawful citizen's arrest. Because a citizen's arrest did not occur and, in any event, Mr. King had probable cause to arrest defendant, such a motion would not have been, successful. See Commonwealth v. Harris, 11 Mass. App. Ct. 165, 172 rev denied, 383 Mass. 890 (1981). Accordingly, counsel was not ineffective for failure to file such a motion. Commonwealth v. Pike, 52 Mass. App. Ct. 650, 656 (2001).

[7] The jury's verdict makes clear that they rejected defendant's version of events that he did not commit any crime in the bar and was attacked by Mr. King and his alleged cohorts. See Commonwealth v. Sirois, 437 Mass. 845, - - - n.13 (2002) (verdict showed that jury rejected defendants version of events).

C. Counsel rendered effective assistance when he permitted the introduction of the victim's medical records in lieu of eliciting expert opinion Interpreting the records and attempted to use the records to show that the victim exaggerated his injuries.

In one breath defendant claims that his counsel was ineffective for failure to call a medical expert to decipher the purportedly illegible medical records because they assisted his claim that the victim exaggerated his eye injury to the jury. (D.Br. 21). In the next breath, defendant claims that his counsel was ineffective for failure to oppose the admissibility of these medical records. (D.Br. 16-20). Because there is no evidence that the medical **[38]** records were illegible and no indication that there were inadmissible, and counsel's decision to agree to their admission was strategically sound, defendant has not shown that counsels assistance was ineffective.

First, the victim's medical records were admissible. While it is true that illegible portions of medical records (either due to abbreviations and technical jargon or indecipherability) should be redacted, "[i]llegibility is a relative matter and there must be broad discretion in the trial judge to determine in a particular case whether writing in a hospital record can be read and decoded." Commonwealth v. Baldwin, 24 Mass. App. Ct. 200, 203, rev. denied, 400 Mass. 1102 (1987). The judge did not abuse his discretion when he admitted the records into evidence, because they were legible.

During the victim's testimony the prosecutor sought to introduce the victim's medical records. (Tr.II 446-53). During the lengthy sidebar on this matter, it is clear that the prosecutor, trial counsel, and the judge had no problems deciphering the records. (Id.). Counsel succeeded in convincing the judge to redact certain portions of the records, including the victim's report that he had vitreous **[39]** fluid coming from his

eye. (Tr.II 450, 452). While looking at the records, the judge also redacted other portions that were hearsay not falling within any exception that would render them admissible. (Tr.II 450-52). Implicit in this discussion about the content of the records is the judge's opinion that the records were legible. As the motion judge found, defendant forwarded no evidence in his motion for new trial that they were otherwise. (Def. Addendum 11). Accordingly, the trial judge did not abuse his discretion when he admitted the medical records into evidence and trial counsel was not ineffective for failure to object to their admissibility. See Commonwealth v. McLeod, 39 Mass. App. Ct. 461, 463-64 (1995) (counsel not ineffective for failure to object to admission of evidence that was not "clearly objectionable"), rev. denied, 422 Mass. 1101 (1996).

Similarly, counsel was not ineffective for failure to call an expert witness to interpret the medical records, as any information to which he would have testified was cumulative of that before the jury, and his testimony would not have been dispositive of whether defendant had the intent to gouge out Mr. King's eye. **[40]**

In his motion for new trial, defendant provided the affidavit of Dr. Joseph Hull. (R.A. 126-27). Dr. Hull averred that King's medical records revealed that King suffered from a superficial abrasion to the lids and a small laceration to the conjunctiva and that there was no bleeding and the injuries were consistent with being poked in the eye. (R A. 126-27). The laceration and abrasion information, however, was contained in the medical records' before the jury. Trial counsel also presented John Hayes, who, unlike Dr. Hull, saw Mr. King right after the incident, and testified that he did not see any blood or fluid coming from King's eye and that his injury did not look serious. (Tr.IV 916-18). He further testified that Mr. King stated that he must have gotten "poked in the eye." (Tr.IV 918). Based on this information trial counsel argued that

King greatly exaggerated his eye injury. (Tr.V 1224-25). Because the additional testimony would have been cumulative of the evidence counsel had already presented at trial and not as convincing given the Dr. Hull did not see King after the incident, defendant has not shown how his counsels performance was deficient or deprived him of a substantial ground of defense. See **[41]** Commonwealth v. Sarmanian, 426 Mass. 405, 407 (1998) (counsel not ineffective for failure to present additional witnesses that would have been cumulative of evidence already presented at trial). Accordingly, defendant's assertion that his counsel was ineffective for failure to object to the admission of the medical records or call an expert to interpret the records for the jury, fails.

D. The prosecutor properly commented on the evidence in his summation.

Lastly, defendant asserts that the motion judge erroneously denied his motion for new trial because the prosecutor's opening statement and closing argument were purportedly rife with every type of prosecutorial error. (D.Br. 49-50). Defendant's claim is frivolous.

First, defendant attempts to incorporate into his brief those portions of his motion for new trial alleging prosecutorial error in this regard. (D.Br. 49-50). Those issues not directly addressed in his brief are waived and should not be addressed by this Court. Mass. R. App. P. 16(a)(4).

Second, in his brief, defendant addresses one claim, namely, that the prosecutor referred to facts not in evidence when he stated in his closing argument that defendant admitted/testified that he gouged Mr. King in the eye. (D.Br. 50). Viewing the closing argument in its entirety, Commonwealth v. Degro, 432 Mass. 319, 325-26 (2000), the prosecutor did not misstate the evidence.

The prosecutor stated as follows:

> And then [defendant] takes the stand **and he tells you this story. Remember when he said he gouged King's eye? Did that make sense to anybody? I'm sorry, he said, King gouged his eye.** Does that make sense to anybody? That King came over to him while he was on the ground and gouged his eye. Those were his words, 'He gouged my eye.'

(Tr.V 1234 (emphasis added)). As is demonstrated above, the prosecutor immediately recognized his misstatement, apologized for it and corrected it. This correction, in conjunction with the judge's repeated instructions that closing arguments and statements of counsel are not evidence, ensured that the prosecutor's argument did not create a substantial risk of a miscarriage of justice. Commonwealth v. Maynard, 436 Mass. 558, 570-7 1 (2002). Accordingly, the motion judge correctly rejected this claim. **[43]**

Conclusion.

For the reasons set forth above, the denial of defendant's motion for new trial should be affirmed.

Respectfully Submitted,

JOHN J. CONTE,
District Attorney
For the Middle District,
ANNE S. KENNEDY,
Assistant District Attorney
BBO #635653
Courthouse, Room 220,
Two Main Street,
Worcester, MA 01608
(508) 757-2786

OCTOBER 2002 **[44]**

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. **SUPERIOR COURT**
CRIMINAL ACTION
NO. 93-0135

COMMONWEALTH
vs.
MICHAEL ELBERY

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION FOR A NEW TRIAL AND REQUEST FOR AN EVIDENTIARY HEARING

On July 2, 1993, after a five-day jury trial, the defendant, Michael Elbery, was convicted of assault and battery (G.L. c. 265, §13A), assault with intent to maim (G.L. c. 265, §15), and being a disorderly person (G.L. c. 272, §53).[1] A fourth count of assault with a dangerous weapon (G.L. c. 265, §15B(b)) was dismissed at trial. The defendant's convictions were affirmed on appeal. 38 Mass. App. Ct. 912. Representing himself pro Se, the defendant now moves for a new trial pursuant to Mass. R. Crm. P. 30(b)[2].

[1] The defendant was sentenced to ten (10) years' imprisonment at M.C.I., Concord, on the maiming charge. At the sentencing the judge, Toomey, J., expressed his intention that the defendant serve one (1) year. The defendant was also sentenced to concurring one (1) year's probation for the other two convictions to be served after the maiming sentence.

[2] Despite a 60-page limit ordered by Judge Toomey, the defendant submitted a 115-page memorandum of fact and law and an eight-page amendment to the original memorandum in support of his motion for new trial. Specifically, Judge Toomey's February, 28, 1997 order stated that, "Defendant's memorandum shall not exceed 60 pages including items of appendix, addendum

In addition, the defendant seeks an evidentiary hearing and further discovery as allowed by Mass. R. Crim. P. 30 regarding the injuries he allegedly sustained by Thomas King. Following are the grounds upon which the defendant primarily relies: ineffective assistance of trial counsel[3] and appellate counsel[4], judicial misconduct[5], prosecutorial misconduct[6], that the verdict was against the weight of the evidence (insufficient evidence)[7], inadequate jury instructions[8], inadmissible evidence admitted during trial[9], and duplicative sentencing[10]. For the following reasons, it is hereby **ORDERED** that the defendant's motion for a new trial and request for an evidentiary hearing are **DENIED**.

and copies of documents as to which Defendant makes reference in the memo."

The defendant filed a petition for relief to the Supreme Judicial Court from the Superior Court order limiting his memorandum in support of his motion for new trial to 60 pages. In a decision dated July 13, 2000, a single justice of the Supreme Judicial Court denied the petition, and the defendant appealed. The Supreme Judicial Court held that the defendant had another available remedy and, thus, was not entitled to extraordinary relief. Elbery v. Commonwealth, 432 Mass. 1007, 1007-1008 (2000).

[3] See Counts I - XV, excluding III.

[4] See Counts XVIII.

[5] See Counts IX and Count I of the amended motion.

[6] See Counts II, IV, VI, VIII, X, XII, and XVI.

[7] See Counts VI and VIII.

[8] See Count XVII.

[9] See Count III.

[10] See Count XIV.

BACKGROUND

The trial transcript indicates that the jury could have reasonably found the following facts:
At the time of the incident at issue, Michael Elbery was 42 years old. He had previously owned a bar in the city of Worcester. On the evening of September 28, 1992, he stopped by the Winner's Circle bar located on Shrewsbury Street in Worcester. Elbery was acquainted with the bartender of that evening, Jeff Schlener. He did not know any of the other 10-15 patrons in the bar at the time. The Winner's Circle is a small establishment and all of the patrons were seated at the semi-circle shaped bar. Elbery was served two beers that evening, finishing approximately one of them before the incident occurred. He was not intoxicated. Among the other patrons in **[21]** the bar were two off-duty doormen employed by the bar, two young women who had stopped by after working a waitressing shift at the Ground Round, and Thomas King, an off-duty detective for the Westborough Police Department. King had consumed approximately two cocktails, but was not intoxicated.

An argument ensued between Elbery and Schlener. Schlener was poking fun at the fact that Elbery had lost his bar establishment and was drinking cheap beer. King, a friend of Schlener, came to the bartender's defense and told Elbery to back off. Although voices rose, there was no physical confrontation at this point and everyone returned to their seats. Approximately one half of an hour passed and again an argument ensued. While it is not entirely clear from the record, the jury could have reasonably found at this point that Elbery became quite upset and smashed a beer bottle on the bar or a nearby pole. The bottle shattered and Elbery was left holding the barrel of the bottle. A shard of glass flew and struck Christina Mann, one of the waitresses, under her eye causing her to bleed. Mann was

assisted by another patron who happened to be a chiropractor, and was later taken by a friend to a nearby hospital.

Within about a minute of the bottle breaking, Elbery left the bar. King yelled at him to stop and wait for the Worcester Police to arrive as someone had been injured inside. Elbery testified that he intended to get into his car and leave. However, King testified that he did not see keys in Elbery's hands and did not see Elbery reach for his pocket. Once outside the bar, King pursued Elbery down the street. In addition to King, the two off-duty doormen and between one and three other patrons of the bar also followed Elbery. It appears that King was in the front of the group since he testified that he did not realize others had followed him out of the bar. Although it is unclear exactly what happened at this point, the jury reasonably could have found that King caught up to Elbery and an altercation ensued. King testified that Elbery threw **[3]** multiple punches at him and then, in response, King tackled him. As both of them were on the ground, Elbery stuck his finger in King's eye doing serious damage. The group assisted the injured King by holding Elbery on the ground thereby allowing King to free himself from the altercation. Prior to the police arriving, King was brought to a nearby hospital by two men in a passing car. The Worcester Police arrived shortly thereafter and arrested Elbery.

Following his July 2,1993 jury trial, the defendant received a sentence of one (1) year's imprisonment on the maiming charge and concurrent sentences of one (1) year's probation for the other two convictions to be served after the maiming sentence. The defendant's sentence was stayed on July 15, 1993, pending an appeal of his convictions. With new counsel Robert C. Sheketoff, Esq. representing him, the defendant appealed his convictions based on a prejudicial statement made by the prosecutor during closing arguments and on improper and incomplete jury

instruction.[11] On January 26, 1995, the Appeals Court affirmed the convictions in a written decision. [12] Commonwealth v. Elberry (sic), 38 Mass. App. Ct. 912 (1995), rev, denied, 419 Mass. 1107 (1995).

DISCUSSION

I. Motion for a New Trial Standard

"The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done." Mass. R. Crim. P. 30(b). The standard is purposely broad as the disposition of a "motion for new trial is addressed to the sound discretion of the judge." Commonwealth v. Moore, 408 Mass. 117, 125 (1990). "[O]nce the regular procedures have run their course the presumption tilts heavily toward finality." Commonwealth v. Amirault, 424 **[4]** Mass. 618, 637 (1997). "New trials should not be granted except for substantial reasons." Id, quoting Commonwealth v. Tucceri, 412 Mass. 401, 406 (1992). "The mere fact that, if the process were redone, there might be a different outcome, or that some lingering doubt about the first outcome may remain, cannot be a sufficient reason to reopen what society has a right to consider closed." Id.

II. Waiver of Claims

As mentioned previously, this motion for a new trial comes after the conviction has already been affirmed on direct appeal. Consequently, "[t]he concern for

[11] The defendant was represented by Louis P. Aloise, Esq. at trial.

[12] The Appeals Court found that the prosecutor's statement was prejudicial but the corrective instruction used by the trial judge was adequate. The Appeals Court also determined that the trial judge's instructions concerning the elements of the crimes were sufficient.

finality demands that a defendant present every claim and argument he might fairly have had available to him the first time around." Amirault, 424 Mass. at 639. Therefore, "absent extraordinary circumstances ... the defendant who had a fair opportunity to raise [an issue] may not belatedly invoke that right to reopen a proceeding that has already run its course." Id. (citations omitted). Furthermore, "if [the defendant] had an opportunity to invoke the right and failed to avail himself of it, the claim is waived and may not be raised for the first time on collateral attack." Id. "The test for waiver is whether the 'theory on which his argument is premised has been sufficiently developed to put him on notice that the issue is a live issue.'" Id. (citations omitted). In addition, the doctrine of waiver "'applies equally to constitutional claims which could have been raised, but were not raised' on direct appeal or in a prior motion for a new trial." Commonwealth v. Watson, 409 Mass. 110, 112 (1991), quoting Commonwealth v. Deeran, 397 Mass. 136, 139 (1986).

The "motion judge's discretion under Rule 30(c)(2) to grant relief from such a waiver is limited if the conviction has already received appellate review." Commonwealth v. LeFave, 430 Mass. 169, 174 n.5 (1999). If the issue has been waived, the judge may not consider it, unless in the exercise of discretion the judge determines there is a substantial risk of a miscarriage of **[5]** justice. See id. at 173-174. The judge's discretion in granting relief from waiver should not be exercised lightly, and should only be exercised if "upon sober reflection, it appears that a miscarriage of justice might otherwise result." Commonwealth v. Gagliardi, 418 Mass. 562, 565 (1994), cert. denied, 513 U.S. 1091 (1995). Here, the defendant's claims of judicial misconduct, prosecutorial misconduct, that the verdict was against the weight of the evidence (insufficient evidence), inadequate jury instructions, inadmissible evidence admitted during trial, and duplicative sentencing were all areas of the law that

were sufficiently developed at the time of his appeal to put the defendant on notice that these issues were live issues. Consequently, all of the above claims could have been raised on direct appeal but were not. Therefore, the above issues are waived.

III. Ineffective Assistance of Appellate Counsel

The defendant's ineffective assistance of counsel claims are also subject to the waiver rule. See Lefave, 430 Mass. at 17 1-173; see also Commonwealth v. Evardo, 426 Mass. 48, 49,50 (1997). In situations where the defendant has been represented by the same attorney at trial and on direct appeal, that defendant may seek review of the trial counsel's performance, even though no ineffective assistance of counsel claim was asserted on direct appeal. See Egardo, 426 Mass. at 49. The reasoning behind this exception to the waiver rule is "that it would be 'unrealistic to expect [the defendant's] first attorney to have raised a claim calling his own competence into question.'" Id., quoting Commonwealth v. Lanoue, 409 Mass. 1, 3-4 (1990). In situations where the defendant has had new appellate counsel, the defendant's "first opportunity" to raise the issue of trial counsel's ineffectiveness would be on direct appeal. See Egardo, 426 Mass. at 49-50 ("[b]ecause trial and appellate counsel were associates in the practice of criminal law, the second attorney thus furnished the defendant his 'first opportunity' to raise the issue of **[6]** trial counsel's effectiveness"); see also Breese v. Commonwealth, 415 Mass. 249, 250 n. 1 (1993).

In this case, the defendant's first opportunity to raise an ineffective assistance of trial counsel was on direct appeal since the defendant had different representation at that time. Therefore, the defendant's ineffective assistance of trial counsel claim is waived. However, the defendant also claims that his appellate counsel was ineffective because he

failed to argue on appeal that his trial counsel rendered ineffective assistance. This is the defendant's first opportunity to raise an ineffective assistance of appellate counsel. Therefore, the question of whether the defendant's appellate counsel was ineffective necessarily depends on whether he actually received ineffective assistance at his trial. See Breese, 415 Mass. at 252; Commonwealth v. Van Zant, 1999 WL 823745 n.6 (Super. Ct. 1999) (Neel, J.). Consequently, this Court has reviewed the trial transcript to determine whether the defendant received ineffective assistance of counsel at trial which, in turn, would also answer whether or not the defendant's appellate counsel was ineffective by failing to bring an ineffective assistance of trial counsel claim on direct appeal.

The defendant bears a heavy burden in establishing ineffective assistance of counsel such that a new trial is required. See Commonwealth v. Brookins, 33 Mass. App. Ct. 626, 631 (1992), rev'd on other grounds, 416 Mass. 97 (1993). In order to support a claim of ineffective assistance of counsel, the defendant must show serious incompetency, inefficiency, or inattention of counsel falling "measurably below that which might be expected from an ordinary fallible lawyer" and that such inadequacies "likely deprived [the defendant] of an otherwise available, substantial ground of defense." Commonwealth v. Clark, 44 Mass. App. Ct. 502, 512 (1998), quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). To succeed on a claim of **[7]** ineffective assistance of counsel, the defendant must show that better work by trial counsel might have accomplished something material for the defense. See Commonwealth v. Satterfield, 373 Mass. 109, 115 (1977). Counsel's tactical judgments must be "manifestly unreasonable" to constitute ineffective assistance. See Commonwealth v. White, 409 Mass. 266, 273 (1991). "Judicial scrutiny of counsel's performance must be highly deferential, 'indulg[ing] a

strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Commonwealth v. Florentino, 396 Mass. 689, 690 (1986) (citation omitted).

At bar, there is no evidence that trial counsel's performance was ineffective nor that it deprived the defendant of an otherwise available substantial ground of defense. The trial counsel's performance fell well within the realm of what may be expected from an ordinary fallible attorney. In his 115-page memorandum of fact and law in support of his motion for new trial, Elbery claims multiple instances of ineffective assistance of counsel on the part of his attorney at trial, Louis P. Aloise. The defendant makes a series of allegations which either are not grounded in the record or do not amount to ineffective assistance of counsel. Generally, Elbery claims that Aloise conspired with the prosecution to withhold the truth about the evidence upon which he was convicted. However, there is no evidence of any conspiracy. Most of Elbery's contentions arise from strategic decisions on the part of his trial counsel that did not impact the strong case the Commonwealth had against him. Commonwealth v. Rondeau, 378 Mass. 408, 413 (1979) (strategic trial decisions do not constitute ineffective assistance of counsel unless they are "manifestly unreasonable"). See also Commonwealth v. Finstein, 426 Mass. 200, 203 (1997); Commonwealth v. Roberts, 423 Mass. 17, 20 (1996). The following issues are being raised solely for the purpose of determining whether a new trial is warranted based upon **[8]** ineffective assistance of trial counsel.

A. Failure to Introduce Evidence

There is no evidence that Aloise conspired to withhold pertinent information from the jury. Elbery alleges that Aloise conspired with the prosecution to withhold from the jury the true cause of King's eye

injuries. There is no evidence that this occurred. Aloise described King's eye injury in a manner advantageous to Elbery by noting that the injury was a "superficial abrasion" (Tr. Vol. V/ 1225[13]) and that if the facts occurred as King described them, "Mr. King would not have his eye in the head today." Tr. Vol. V/ 1224. Elbery also alleges that his trial counsel failed to highlight to the jury the fact that there was no police investigation, and that he was attacked by a "gang of six." Contrary to this contention, in his opening statement, Aloise questioned whether an adequate investigation had been conducted because it essentially consisted of a dispatch. Tr. Vol. 1/127. In addition, in his closing statement, Aloise stated that Elbery was being chased by six or seven individuals. Tr. Vol. V/1218.

Elbery also claims that Aloise was ineffective because he failed to call certain witnesses which would have assisted his case. However, there is no merit to this contention. There is no evidence that calling Dr. Stephen Sawyer as a witness would have provided Elbery with a substantial ground of defense because he would not lie on the stand and thus upset the alleged conspiracy between Aloise and the prosecution. There is also no evidence that calling Alice Arsenault (a friend of Mann), Don Wynne, or Assistant District Attorney Michael Salloum as witnesses would have provided a material defense for Elbery. See Commonwealth v. Epsom, 422 Mass. 1002, 1003 (1996) (at hearing on motion for new trial based on ineffective assistance of counsel where lawyer failed to call witness providing evidence of self-defense, court required **[9]** defendant to show: (1) witness was available at time of trial; (2) the testimony would have been sufficient to raise the issue of self-defense; and (3) that testimony would likely have made a material difference in the trial).

[13] citations to the Trial Transcript references are indicated as "Tr. vol," followed by the volume and page number.

Elbery alleges that King testified at the probable cause hearing at the Worcester District Court on January 20, 1993, that there was no assault with a beer bottle and that Aloise failed to introduce this evidence to the jury. However, King did in fact testify during the proceedings that there was an assault with a beer bottle. In response to Assistant District Attorney Todd Mathieson's direct examination of King, King stated that "Mr. Elbery was holding the neck of the bottle in a threatening gesture, yelling."[14] Moreover, Aloise did raise doubt during the trial as to whether there was a breaking of a beer bottle at all ("Mr. Taraskiewicz didn't see the bottle break. Nobody saw the bottle break" (Tr. Vol. V/ 1217); "Mr. Schlener said that he didn't see the bottle break, he heard it... he said he lied to the police in that he was assaulted with that beer bottle" (Tr. Vol. V/12 19)).

Elbery claims that Aloise was also ineffective because he failed to admit Elbery's medical records regarding his injuries and evidence regarding the clothing he wore during the incident. However, Aloise did admit Elbery's medical records from Hahnemann Hospital as Exhibit 23. Tr. Vol. V/1196. Further, Aloise introduced photographs B, C, D, and E for identification which pictured Elbery's alleged injuries on the event in question. Tr. Vol. IV/812-816. Elbery also claims Aloise was ineffective because there was an illegal citizen's arrest by King which Aloise failed to make clear to the jury. However, there was not an illegal citizen's arrest. Aloise did, in his cross-examination of King, elucidate the fact that King was off-duty and acting in the capacity of a private citizen that night.[15] For these reasons, it was also **[10]** unnecessary for Aloise to file a motion to suppress

[14] Worcester District Court Proceedings, January 20, 1993, page 9.

[15] Worcester District Court Proceedings, January 20, 1993, page 39.

evidence from the alleged illegal citizen's arrest of Elbery.

Elbery claims that Aloise failed to subpoena Mann's medical records which Elbery believes would show the true nature of her injuries. However, the extent of Mann's injuries were not at issue in this case since Elbery's convictions related to the injuries inflicted on King. Elbery alleges that Aloise also failed to subpoena evidence from the Westborough Police Department regarding King's demotion and drinking on duty which he believes created a motive for King to lie. There is no evidence that this created a motive to lie nor that it deprived Elbery of a substantial ground of defense. Compare Commonwealth v. Juzba, 46 Mass. App. Ct. 319, 322-323 (1999) (although counsel's failure to obtain police chemist's report and/or police chemist's testimony regarding the absence of sperm or seminal fluid in a rape case did fall below what was expected from an ordinary fallible lawyer, it did not deprive the defendant of a substantial, available defense where it corroborated the defendant's testimony).

B. Failure to Object

Elbery alleges that Aloise failed to object to certain evidence which was prejudicial. However, there is no evidence that Aloise's alleged failures to object deprived Elbery of a material ground of defense. Elbery contends that Aloise failed to object to the admission of King's medical report which he asserts was inadmissible due to its references to liability as well as illegible and hyper-technical content. See G.L. c. 233, §79. However, there is no evidence that the medical report suffered from this condition. Any references to liability in the medical report do not necessitate retrial because they do not add anything to the testimonies at trial. See Commonwealth v. Brattman, 10 Mass. App. Ct. 579, 586 (1980).

Elbery claims that Aloise failed to object to Assistant District Attorney Ball expressing **[11]** his own opinion and misstating facts and testimony in his opening and closing arguments. There is no evidence that Assistant District Attorney Ball's opening and closing arguments contained such errors. The prosecutor may comment on evidence developed at trial and draw inferences from such evidence. See Commonwealth v. Bradshaw, 385 Mass. 244, 275 (1982); Commonwealth v. Chavis, 415 Mass. 703, 713 (1993). The prosecutor may also make a fair response to an attack on the credibility of a government witness. Chavis, 415 Mass. at 713, citing Commonwealth v. Simmons, 20 Mass. App. Ct. 366, 371 (1985); see Commonwealth v. Smith, 404 Mass. 1, 7 (1989). The judge also provided curative instructions in stating that "[t]he opening statements and the closing statements that we just heard from counsel are not a substitute for evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties." Tr. Vol. V/ 1257-58.

Elbery also states that Aloise failed to object to various inappropriate instructions or to the fact that certain instructions were absent. Again, there is no evidence that the instructions were improper or deficient. Among other things, the trial judge instructed the jurors on their role as fact-finders and the importance of focusing solely on the evidence, the difference between direct and circumstantial evidence, inferences, the Commonwealth's burden of proof beyond a reasonable doubt, consciousness of guilt, disorderly conduct, assault and battery, assault with intent to maim, intoxication, and self-defense. (Tr. Vol. V/ 1251-1294). There was nothing improper about the instructions to the jury. See Commonwealth v. Melton, 47 Mass. App. Ct. 904, 905 (1999) (counsel's failure to request a more forceful curative instruction concerning opinion testimony did not amount to error). Since there was no reason to

object, Aloise's failure to object was justified. Compare Commonwealth v. Nunes, 430 Mass. 1, 7 (1999) (failure to object to three infractions by the Commonwealth on cross of defendant, although improper, **[12]** would not have affected jury verdict and, therefore, there was no ineffective assistance of counsel).

C. Conflicts of Interest

Although Elbery alleges that there are various conflicts of interest which deprived him of a fair trial, there is no substantiation on the record for his allegations. For instance, he alleges that Aloise's secretary is "best friends" with bartender Schlener 's wife and that Aloise was ineffective because he failed to stop Aloise 's secretary from passing along confidential information to her friend's husband, Schlener. However, there is no evidence on the record that any such conflict of interest existed nor that any such acts occurred. Elbery also alleges that because Aloise asked Elbery to take a lie detector test it shows that Aloise had a conflict of interest because he was repeatedly reinforcing the prosecution's arguments. Again, there is no such evidence. Aloise represented Elbery effectively and countered the prosecution's version of the facts in terms of describing the events as a mere "barroom fight" (Tr. Vol. V/ 1229), downplaying King's injuries as a "superficial abrasion" (Tr. Vol. V/ 1225), and arguing that Elbery was acting in self-defense (Tr. Vol. V/ 1221-22). There is also no conflict of interest merely because the prosecuting Assistant District Attorney Ball may have been a former police officer.

D. Misleading Use of Terms

Elbery contends that Aloise used certain incorrect terms and failed to object to certain terms that allegedly confused the jury. Elbery claims that Aloise

adopted the prosecution's facts and theory of the case by using terms such as "right, "am I right," and other expressions during cross-examination of the Commonwealth's witnesses which misrepresented Elbery and made the jury put Elbery in a bad light. These allegations are not valid since phrases such as "right" and **[13]** "am I rights," especially with leading questions during cross-examination, are typical trial practice techniques.

Elbery also claims that the judge's use of the phrase "moral certainty" in his jury instructions obscured for the jurors the defendant's standard for proving his case beyond a reasonable doubt. However, case law has determined that use of the phrase does not render the instructions improper. In Victor v. Nebraska, 511 U.S. 1, 14 (1994), cert. denied, Calderon v. Sandoval, 122 S.Ct. 322 (2001), the Supreme Court decided that although "'moral certainty,' standing alone, might not be recognized by modern jurors as a synonym for 'proof beyond a reasonable doubt'.. .it does not necessarily follow that the...instruction is unconstitutional." Id. The Supreme Court reasoned that the "moral certainty language [could] not be sequestered from its surroundings." Id. at 16. Thus, Aloise was not ineffective for failing to object to the judge's use of the term "moral certainty." He was also not ineffective for failing to object to the judge's use of the phrases "whether or not" and "basic fact" in the jury instructions, because those terms are also proper.

E. Miscellaneous

Elbery also alleges various other instances of ineffective assistance of counsel which are unfounded. For instance, Elbery claims that Aloise failed to impeach witnesses with perjurious prior inconsistent statements and aided the prosecution with false testimony. However, Aloise did point to discrepancies in the testimonies of the

Commonwealth's witnesses and repeatedly called the Commonwealth's rendition of the facts of the case "patently absurd." (Tr. Vol. V/ 122 1-24). **[14]**

In addition, Elbery alleges that Aloise failed to argue double jeopardy with Elbery's convictions of assault and battery and assault with intent to maim. Elbery believes that assault and assault and battery are the lesser included offenses of assault with intent to maim. There is no double jeopardy with regard to Elbery's convictions. Double jeopardy refers to the Fifth Amendment prohibition against a "being prosecuted twice for substantially the same offense. Black's Law Dictionary 506 (7th ed. 1999); see Breed v. Jones, 421 U.S. 519. In the instant case, Elbery was convicted of three distinct charges with distinct elements: assault and battery (G.L. c. 265, §13A)[16], assault with intent to maim (G.L. c. 265, §15)[17], and being a disorderly person (G.L. c. 272, §53) [18].

[16] G.L. c. 265, §13A states:

> Whoever commits an assault or an assault and battery upon another shall be punished by imprisonment for not more than two and one half years in a house of correction or by a fine of not more than five hundred dollars.

[17] G.L. c. 265, §15 states:

> Whoever assaults another with intent to commit murder, or to maim or disfigure his person in any way described in the preceding section, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than one thousand dollars and imprisonment in jail for not more than two and one half years.

[18] G.L. c. 272, §53 states:

> Common night walkers, common street walkers, both male and female, common railers and brawlers, persons who with offensive and disorderly acts or language accost or annoy persons of the opposite sex, lewd, wanton and lascivious persons in speech or behavior, idle and disorderly persons, disturbers of the peace, keepers of noisy and disorderly

Contrary to Elbery's allegations, assault and assault and battery are not the lesser included offenses of assault with intent to maim. Elbery also claims that he was sentenced **[15]** to one year for being a disorderly person when the maximum sentence is only six months. However, Elbery was sentenced to serve one year for the assault with intent to maim charge and one year probation for the assault and battery and disorderly conduct convictions which were to run concurrently. His probation was to begin after his release from jail. Thus, Elbery was not sentenced for longer than his convictions mandated.

Also, contrary to Elbery's contentions, there is no evidence that Aloise sponsored Assistant District Attorney Ball to lie about the bottle assault, nor that Perma (a fellow cop), De Pasquale (an acquaintance of King) or Mann lied on the stand as witnesses. There is also no evidence that the pictures admitted at trial were falsified or duplicative. Nor did Aloise have the responsibility, nor the capacity, to file criminal charges against King for the injuries he allegedly caused Elbery. There is also no evidence that Aloise abandoned his client.

For the aforementioned reasons, the defendant has failed to show that trial counsel's representation was seriously deficient and that he was deprived of an otherwise available material ground of defense. Since there was competent representation by the trial attorney, appellate counsel was not ineffective for failing to argue on appeal that the defendant's trial counsel rendered ineffective assistance. See Breese, 415 Mass. at 252.

houses, and persons guilty of indecent exposure may be punished by imprisonment in jail or house of correction for not more than six months, or by a fine of not more than two hundred dollars, or by both such fine and imprisonment.

IV. Evidentiary Hearing Not Warranted

In addition to his request for a new trial, the defendant requests an evidentiary hearing and further discovery. A judge has broad discretion to deny a motion for new trial upon review of the motion and affidavits without conducting an evidentiary hearing. Commonwealth v. Rice, 427 Mass. 203, 207 (1998); see also Commonwealth v. Lopez, 426 Mass. 657, 663 (1998). **[16]** "[T]he judge may decide a rule 30(b) motion based solely on affidavits; may discredit untrustworthy affidavits; and need only proceed to evidentiary hearing 'where a substantial issue is raised [by the motion or affidavitsl and is supported by a substantial evidentiary showing.'" Lopez, 426 Mass. at 663, citing Commonwealth v. Stewart, 383 Mass. 253, 260 (1981); Mass. R. Crim. P. 30(c)(3) ("[the judge may rule on the issue or issues presented by such motion on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits"). The court need only hold an evidentiary hearing if a substantial issue is raised by the motion and affidavits and is supported by a substantial evidentiary showing. Id. In determining whether the defendant has raised a 'substantial issue' meriting an evidentiary hearing under Rule 30, the court looks at the seriousness of the issue asserted and to the adequacy of the defendant's showing on the issue raised. Commonwealth v. DeVincent, 421 Mass. 64, 67 (1995). Further, the defendant must show that an evidentiary hearing is necessary to provide the judge with additional information not already contained in affidavits. See id. at 68. Here, the defendant has not demonstrated that substantial issue exists which would require additional information not already contained in the defendant's submission or the record. Consequently, the defendant's request for an evidentiary hearing is denied. **[17]**

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the Defendant's Motion for a New Trial and Request for an Evidentiary Hearing are **DENIED**.

/s/
Timothy S. Hillman
Justice of the Superior Court

DATED: December 21, 2001

FILED
DEC 26 2001
ATTEST: /s/ CLERK [18]

APPENDIX F

[264]... THE COURT: Okay. All right. I find no **[265]** probable cause for the assault with intent to maim, that's for sure. I find probable cause on a disorderly person. Assault and battery with a dangerous weapon, a beer bottle, I find no probable cause.

Assault and battery is a troubling issue, and troubling in the following manner: I believe that in fact Mr. King went to stop a person who he had no right to stop.

The disorderly person I find not outside but inside, because when the officer came along and four or five people were standing there, I don't see how he can be disorderly.

The assault and battery on Thomas King, I suggest that Thomas King raced after him to stop him from going, and he had no right to stop him, so I find no probable cause on that.

Probable cause on disorderly person only.

I tried to explain earlier that I - I'm concerned there was no assault with the beer bottle. It was reckless misconduct when he hit the bottle on the post. If a death ensued, that would be involuntarily manslaughter. However, it's **[266]** malicious destruction of property. It's not a felony, and the police officer was a police officer in Westboro, not Worcester. Everyone knew who he was, and they could have called the police after.

Okay. That's it.

(Whereupon, at 4:30 p.m., the hearing was concluded.)

APPENDIX G

Argument I-None of the defendant's motion claims are waived because they are either "Brady Violations", or factual issues not appearing on the trial record, or claims that should have been raised by the defendant's appellate counsel,or claims of miscarriage of justice.

The court per memo has found that all the defendant's motion claims are waived for review under Rule 30b, except for the trial attorney's ineffective assistance claims not raised by appellate counsel, see p. 7 of memo. The defendant agrees that claims of ineffective assistance of trial counsel that could have been raised by the defendant's appellate counsel are a "waiver exception" and properly included in a motion for new trial. Com. v. Miranda, 490 NE2 1195, 1200, 22 Mass. App. 10, 17-18 ('86), Com. v. Sowell, 609 NE2 492, 494 ('93), 34 Mass. App. Ct. 229, 231.

Contrary to the court's memo p. 7, (court claims the defendant raised his claim of ineffective assistance of appellate counsel only to the extent of failure to raise on direct appeal ineffective assistance of trial defense counsel), the defendant raises a claim of ineffective assistance of appellate counsel, claim XVII-RA 114, to the extent that motion claims should have been raised on direct appeal. There is a constitutional right to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387,396-97 105 S.Ct. 830, 837 ('85), Gray v. Greer, 800 F2 644, 646 (7th Cir. '85). Constitutional law does not limit the right to appellate counsel to only claims of ineffective assistance of trial counsel. Evitts id.

None of the defendant's motion claims are waived for review, via Rule 30b, because all the defendant's motion claims fit into one of 4 categories that, per Mass. law, can only be raised in the first instance on a motion for new trial, or are a recognized "issue waiver exception". Rule 30b is properly used for more

than "newly discovered evidence" and "issue waiver exceptions", as a matter of law.

1. The first category of claims raised by the defendant are the numerous "Brady" violations that must only be raised in the first instance via a motion for new trial under 30b. All the "Brady" violations in the defendant's motion are of the first category mentioned in United States v. Agurs, 427 U.S. 97,103 96 S.Ct. 2392, 2397 ('76), "knowing use by the prosecution of perjured/false evidence". Com. v. Tucceri, 412 Mass. 401, 405, 589 NE2 1216, 1219 ('92)-ftnt. 3. These type of claims, obviously, raise factual evidence not of the trial record. The appellate counsel is only able to raise issues on direct appeal that appear on the trial record. White v. White, 662 NE2 230, 232, 40 Mass. App. Ct. 132, 133 ('96) & MRAP-Rule 8 (record of lower court is record for appeal).

> Per Tucceri 412 Mass. 408-409, "there is no reason why a non-disclosure issue could not be advanced by a motion for new trial to which the regular principles of MRCP 30b, 378 Mass. 900 ('79) apply. Even if an undisclosed evidence is not "newly discovered", the failure of a prosecutor to furnish exculpatory evidence in his possession is a proper basis for a new trial motion based on common law or constitutional grounds".

2. The defendant also raised other motion claims that, like "Brady" claims, are based on factual issues not appearing on the trial record. This category that can only be raised on a motion for new trial, under Rule 30b, includes ineffective assistance of trial counsel claims based on **facts not appearing on the trial record.**

Per the Mass. SJC in Gibney v. Comm., 375 Mass. 146, 148 375 NE2 714 ('78), "constitutional arguments raised by the petitioner that are based on factual questions are best left for resolution in the first instance by a trial judge on a motion for new trial".

"Moving for a new trial is the customary practice in situations involving ineffective assistance of counsel". Com. v. Frisino, 488 NE2 51, 55, 21 Mass. App. Ct. 551, 556 ('86). "A claim of ineffective assistance of counsel may be resolved on direct appeal of the defendant's conviction when the factual basis of the claim appears undisputedly on the trial record. But when the trial record provides an insufficient factual basis for appellate review, the claim of ineffective assistance of trial counsel is best left for resolution in the first instance by the trial judge on a motion for new trial." Com. v. Adamides, 37 Mass. App. Ct. 339, 344 639 NE2 1092, 1076 ('94), Com. v. Cross, 4 Mass. App. Ct. 54,57, 340 NE2 923 ('76).

3. The third category of claims in the defendant's motion that avoid waiver, via presentation in a motion for new trial, are issues that should have been raised by the appellate attorney on direct appeal or ineffectiveness of appellate counsel. As above, the court agrees, per p. 7 of memo, on this point.

A recognized exception to the issue waiver rule is when both the trial and direct appeal counsel are

ineffective. Miranda[1], 22 Mass. App. Ct. at 17, Sowell[2] 34 Mass. App. Ct. at 231. A claim of ineffectiveness of appellate counsel must be raised in the first motion for new trial. Com. v. LeFave, 430 Mass. 169, 172 ('99), 714 NE2 805, 808 (recognizing right to raise ineffective assistance of appellate counsel on first motion for new trial). See above for constitutional law to right to appellate attorney.

4. Another recognized exception to the waiver rule is a claim of "miscarriage of justice" under the "Freeman standard". Miranda, 22 Mass. App. Ct. at 16. The federal standard of ineffective assistance of counsel and "miscarriage of justice" are the same. Com. v. Curtis, 417 Mass. 619, 625, 632 NE2 821, 826 ftnt. 4 ('94). The claims raised in the defendant's motion, whether individually or collectively, rise to a level of a miscarriage of justice. RA 115, motion conclusion.

As a result of the above, the court's memo, p.5 (II Waiver of Claims), concluding the defendant's motion claims are waived is an error of law. Particularly disturbing is the court's reliance on Rule 30c2 which pertains only to second and successive new trial motion filings; this is undisputedly the defendant's first motion for new trial.

[1] the Mass. SJC in Miranda recognized an exception to the "waiver rule" where the trial defense attorney fails to object at trial and the appellate attorney fails to raise the issue on direct appeal amounts to ineffective assistance of counsel.

[2] Sowell also recognizes that failure of the appellate counsel to argue errors of the trial counsel is an exception to the "waiver rule". Per footnote #4 of Sowell there should be a showing that these errors create a substantial risk of a miscarriage of justice.

Argument IV - The prosecution Knowingly allowed their witness-in-chief, Tom King, to falsely testify that the defendant used a broken beer bottle to assault the entire bar and the defense attorneys knowingly allowed it. Count VI of motion - RA 46-58.

The trial was further infected with constitutional "Brady" violations because the prosecution knowingly allowed witness-in-chief, King, to testify falsely that,

> TR 192 (11-23), TR 194-21, TR 195-3, **Elbery held off the entire bar for 30 seconds with a broken jagged beer bottle not only making jabbing threatening gestures at Schlener but the rest of us patrons in the bar.** See RA 52 & RA 151 (Ex. L-ftnt.4-botfle assault).

This evidence was used to support the prosecution's "assault by a dangerous weapon charge" (beer bottle). Also, the prosecution used this false evidence at trial to justify King's fabricated citizen's arrest before the assault dangerous weapon charge was directed not guilty. See RA 160 (Ex. M-docket entry 5.0) & RA 41.

The bartender, Schlener, first fabricated to the responding WPD officer-Perma that the defendant used a broken bottle in a "threatening menacing gesture" at him and the other patrons in the bar. See RA 129 (Ex.D-WPD incident report) & RA 49-50. Schlener, the bartender, who originally fabricated the beer bottle assault story to justify his friends beating the defendant in the street, admitted under oath at the probable cause hearing that the defendant did not assault anybody with a beer bottle.

> PC 112-3, It was a random breaking of the bottle, it was pointed at nobody.

> PC 112-(9-14) Elbery went right out the door after he looked at everybody.(see RA 47-50).

King, reluctantly, testified at the probable cause hearing that the defendant never assaulted anyone with a broken beer bottle. That the defendant threw the bottle down immediately and left the bar after the bottle broke,

> PC 21-16 Q. Sir, were you placed in fear by the beer bottle that Mr. Elbery had in his hand?
> A.(King)The distance between us, **NO. He had thrown it down.**
> PC 53-11 Q. Now **after** Mr. Elbery either broke the bottle on the side of the bar or on the pole he **stood up from his seat, his stool and left via the front door**?
> A. (King) yes, sir.
> **PC 54-1 Q. Well he already was up from his seat after smashing the bottle and he immediately went out the door didn't he?**
> A. **(King) Yes**. (See RA 48-49).

As above, the prosecution was put on alert that the beer bottle assault was a fabrication; it never happened.

The original prosecutor, **Salloum**, who was scheduled to handle the probable cause hearing, knew the truth. He **documented**, per RA 133 (Ex. E of the motion), that the beer **bottle assault charge** was **being dropped and no longer considered**. See RA 47 & 48.

That didn't stop the Worcester D.A.'s Office from impairing the grand jury by allowing and sponsoring King to testify to a brand new fabricated story. RA 50

> GJ 6-4 Elbery made jabbing motions at Jeff and then me and the other patrons with the broken beer bottle.

And as above, the prosecution/Worcester D.A.'s Office further encouraged and sponsored King to lie to the trial jury about the defendant and the fabricated charge of assault with the broken beer bottle. See TR 192-(11-23), TR 194-21, TR 195-(3-ll). The jury was left, due to King's perjury, with an image of the defendant as a mad man who would try to stab a group of people he had no controversy with. RA 53 & 57.

This fabricated bottle assault evidence is another count of "knowing use of perjury by the prosecution", requiring a new trial. Tucceri 412 Mass 405; U.S. v. Agurs, 427 U.S. 103. See RA 53.

Prosecutor Used False Bottle Assault to Bolster Case

The prosecutor compounded the effect on the jury of this bottle assault perjury by using it as the **justification**, felony committed, for King's alleged "**citizen's arrest**" of the defendant. (See RA 41 - motion claim V). The prosecutor also lead (used leading questions) his own witnesses and DePasquale at trial, soliciting them to testify that the defendant used a jagged broken bottle to assault all the patrons in the bar. (See RA 150-157, Ex.L *items of motion). The prosecutor used this false/perjured evidence in his opening statement,

> TR. 111-20 (Ball) They saw the defendant standing there with this broken beer bottle and he is waiving this broken beer bottle now, he is waving this beer bottle at all the people in the bar.
> TR 115-17 (Ball) He did swing the broken beer bottle, not only at the girl,

King is named as a victim where it was swung at him.

Where the prosecutor compounds falsifications at trial, as above, by blatantly misrepresenting evidence to the jury, the Mass. SJC held a new trial is required. Collins, 386 Mass. at 14. This is also a violation of the Due Process Clause of the Fourteenth Amendment, and causes a trial that was unfair. Berger v. United States, 295 U.S. 78, 84-89 ('35), Giglio 405 U.S. 153,RA 111 &53.

Ineffective Assistance of Counsel RA 52-58

Trial defense attorney, Aloise, also represented the defendant at the probable cause hearing. See PC transcript. As above, Aloise knew from the probable cause testimonies of King and Schlener, and communications with ADA Salloum prior to the probable cause hearing, that the defendant did not assault anyone with a broken beer bottle. RA 47-48 & 53-58.

As per RA 54, defense attorney **Aloise**, **refused to present** to the **jury** the **above testimonies** that **proved** the **bottle assault** charge (Assault dangerous weapon) was a **knowing fraud by the prosecution**. These testimonies at the probable cause hearing would have been used as substantive evidence, not just for credibility. Forte, 33 Mass. App. Ct. at 185.

Additionally, Aloise **refused** to have that assault-dangerous weapon **indictment dismissed**. The defendant demanded Aloise motion to dismiss the charge because, as above, the prosecution witnesses already admitted the bottle assault never happened. See RA 51 and motion claim VIII, RA 65-70.

Instead, Aloise allowed, **unchallenged**, the prosecution's alleged victim and witness-in-chief to testify,

> TR 192 (11-23), TR 194-21, TR 195-3, Elbery held off the entire bar for 30 seconds with a broken jagged beer bottle not only making jabbing threatening gestures at Schlener and me but at all the other patrons in the bar. See RA 52 & RA 151 (Ex. L-p.2.).

Further, Aloise allowed the prosecution to use this fabricated bottle assault as the alleged felony justifying King's "citizen's arrest", and to make the defendant look like the initiator and aggressor during the incident; this helping the prosecution trick the jury. This deficiency made the **defendant** falsely look like a violent out-of-control **maniac** causing the jury to **more easily believe he attempted to dig King's eye** out of his head. TR 936-21. RA 57-58.

Regardless that the bottle assault-dangerous weapon charge was directed not guilty by the trial judge, the **jury was left** with **King's false testimony** that the **defendant** was a **raging maniac** with a **broken beer bottle assaulting everyone** in the bar. The alleged curative instruction by the trial judge,

> TR 1274-5 don't draw any inferences from the fact the indictment is no longer in front of you.

had no curative effect on that highly prejudicial evidence. Even the Mass. Appeals Court was convinced, per their decision on the direct appeal of this case, that the defendant used a bottle to menace the other people in the bar for half a minute. Com. v. Elbery, 38 Mass. App. Ct. 912, 645 NE2 41, 42 ('95). RA 58.

Aloise by knowingly allowing this false evidence of a bottle assault changed the entire evidentiary picture of the trial and caused a breakdown of the adversarial process at trial making him ineffective in his assistance of counsel. Strickland 466 U.S. 696. The

defendant's appellate attorney, Bobby Scheketoff, failed to raise this claim on direct appeal making him ineffective, again. id.

Argument VI- The prosecutor knowingly allowed trial witnesses to change their prior probable cause hearing testimony, perjury, and the defense counsels allowed it. Count X of motion - RA 73-89.

In addition to the conflict and discrepancies between trial and probable cause hearing testimonies, (which is perjury), allowed by the prosecution surrounding the bottle assault charge and Mann's injuries, (see motion claims IV, VI-RA 30 & RA 46), there were many more prior inconsistent statements not brought to the attention of the jury resulting from probable cause hearing testimonies of various trial witnesses. All the changes in probable cause hearing testimonies given at trial were to the prejudice of the defendant, or falsely inculpatory.

Note, DePasquale and Perma (arresting officer) were, allegedly, defense witnesses, but DePasquale testified during the prosecution's case, and like Officer Perma, was a friend of King's.TR-242- 18. This had the effect of the prosecutor cross-examining his own witnesses; at a minimum DePaspuale and Perma were hostile witnesses.

These changes in trial witnesses probable cause testimonies (perjury) are highlighted and summarized as follows: (see RA 74-89)

1. Schlener, the bartender, at the probable cause hearing, admitted he was at fault for insulting and starting the exchange of "negative statements" between the defendant and he. Schlener **apologized** on the witness stand in open court to the defendant. See RA 74-75. At trial he said the opposite, RA 75-76.

2. At the probable cause hearing, Schlener and DePasquale both said King came around the horseshoe bar after the defendant, who remained seated while King was restrained by many people in

the bar. They both testified King stuck his nose in the conversation ("barbs") between the defendant and Schlener that was none of King's business. They both testified that they told King to mind his own business and go back to his seat. They both testified that the defendant was minding his own business and not bothering with any other customers in the bar. See RA 74-75 & RA 83-84.

However, at trial they said just the opposite, testifying the defendant was the initiator and aggressor, a "steaming big madman" that was also first arguing with other patrons in the bar. See RA 75-76 & RA 84.

3. Prosecution witness, Schlener, and DePasquale admitted under oath at the probable cause hearing that **most of the bar emptied out after the defendant, who immediately** left the bar after the bottle broke, (minimum of 5 men). PC 113, PC 114-19 through PC 118, PC 199-(6-9), PC 234-23. See also RA 67-item 5.

Yet, at trial the prosecution's witnesses tried to convince the jury that King acted alone pursuing the defendant to make his "arrest". TR 371-19, TR 402-5,6, TR 199-1.

4. All witnesses testified, including King, at the probable cause hearing they had no idea how the bottle broke. See RA 67-item 4.

However, at trial several prosecution witnesses, including King and Schlener, testified the defendant smashed the bottle. TR 19 1-4, TR 300-23.

5. Schlener testified at the probable cause hearing that somebody yelled, "call the police", PC 113-8.

However, at trial Schlener gave King the credit, testifying, TR 588-14 Tom King yelled, "call the police". At the probable cause hearing, PC 1 13-(1-24), Schlener admitted no police were called before King exited the bar to chase the defendant. RA 67-item 6.

Prosecution witness-in-chief, Tom King. alleged victim

Presented are conflicting changes in testimony by King not appearing in other claims of the motion. See RA 84-88.

6. King at the probable cause hearing testified he only presumed the police had been called, PC 55-15.

However, at trial King testified, TR 195-18, I yelled to somebody to call the police. RA 86-item 3.

7. *Street v. sidewalk incident*

See RA 86 item 4, where at the probable cause hearing King truthfully testifies the entire pursuit, arrest and struggle with the defendant occurred in the street. All witnesses at the probable cause hearing testified the incident with King and the defendant took place only in the street. See RA 67-item 7.

However, after King was told to change his testimony because no one would believe the defendant would come to a sudden stop in the middle of the street, King testified the entire incident was on the sidewalk, TR 198-(5-7), TR 380-12. See RA 87-item 4.

These changes in testimonies, as per claim X of the motion, RA 73-89, are all perjury that helped the prosecution falsely convict the defendant. 70 C.J.S., Perjury S. 40 p. 287, ('87). (Contradictory statements under oath about same point is perjury). The above conflicting changes in testimony, perjury, distorted the evidentiary picture of the beginning stages, (bar argument & confrontation, exit from bar and flight by the defendant, and chase by King & his gang down the street 100 yards), of the short alleged criminal incident, to the defendant's prejudice. The prosecutor had a duty to correct that perjury and not "knowingly use the above perjury" to convict the defendant. New trial required. Giglio, 405 U.S. 153.

Ineffective Assistance of Counsel

Aloise, who also represented the defendant at the probable cause hearing, failed to alert the jury to this exculpatory evidence, via trial witnesses' probable cause hearing testimonies. This was not just credibility evidence but substantive evidence that could have been used for its full probative value at trial. Forte, 33 Mass. App. Ct. 185-186.

In failing to alert the jury to these changes in testimony Aloise missed an opportunity to impeach the credibility of the above prosecution witnesses, and caused the defendant to look like the initiator and aggressor at the underlying barroom incident, instead of, as at the probable cause hearing, the victim.

These changes in testimonies that Aloise failed to present to the jury changed the entire evidentiary picture of the trial to the prejudice of the defendant making Aloise constitutionally ineffective in his assistance of Counsel. Strickland. 466 U.S. at 696. As was Sheketoff who failed to raise this claim on direct appeal. id.

Reply #1 -Contrary to the Appellee, trial evidence of "Christiana Mann's Cut Face" was perjury. - RA 30-39 Reply CBr.- Arg. B & CBr. - p. 37

The Appellee uses the falsified evidence of Mann's cut face and facial stitching to justify King's illegal pursuit, false arrest and assault of the defendant during the underlying incident on 9-29-92 and to support many of the Appellee's arguments. See CBr. - Arg. B, p.37.

The prosecution knowingly presented false evidence at trial that an 18-year-old girl, Christiana Mann, incurred facial lacerations from glass of a broken beer bottle that the prosecution claimed the defendant broke. Mann testified, initially, at trial that,

> she was standing 3 seats away from the defendant, TR 166-24, when the bottle broke and a little bit of glass flew and cut her, TR 144-6. **Mann testified she went to U. Mass. Hospital and a physician put stitches above and below her eye due to cuts from the flying glass**. TR 147-16 thru TR 148-2. RA 30.

However, Mann slipped during trial examination and contradicted her prior testimony of injury,

> TR 144-13 **I thought I saw a little bit of blood**. But another guy came over and said you know **you are fine and everything.**
> TR 174-18 I said I was at the hospital. I don't know if I said U. Mass. I just called to let you know **I was all right and no glass is in my eye or whatever.** See RA 31 (motion p. 31-item 10).

The defendant's trial counsel failed to pursue, explore or highlight this evidence he tripped on during cross-examination. The jury was left believing the prosecution's "best light fabricated evidence" of Mann's face being cut by the defendant requiring two sets of stitches on her face. RA 37-39.

The original prosecutor on the case, A.D.A. Michael Salloum, knew the truth. **Salloum documents**, per RA 133, that the **reason for King pursuing the defendant** was the defendant's **alleged disorderly conduct** (a minor misdemeanor if true) in the bar. Salloum says nothing on this document **about a "girl" being cut/Injured** or a bottle assault or even a "felony", (No felony P.C.-see p.11), being committed by the defendant prior to King's pursuit of the defendant

100 yards down the street, in order to justify King's citizen's arrest.[1]

As per RA 30&31 (p. 30 & 31 of motion), the prosecutor was put on alert by other evidence that Mann's cut face was a fabrication as follows:

1. There were no criminal charges brought against the defendant for Mann's alleged injury. Com. v. Hawkins, 157 Mass. 551, 553 (1883)(defendant would be responsible for alleged battery due to reckless acts).

2. There was no scarring to Mann's face that should have resulted from glass cuts requiring stitches. RA 179-Aff#3.

3. The prosecutor never pointed to or highlighted as inculpatory evidence any scars on Mann's face, although he was enthusiastic about fabricating all the other evidence at trial. The defense attorney never pointed to any absence of scarring. See TR all. The trial was only 9 months after the alleged facial cutting and stitching.

[1] Evidently, Salloum's investigation yielded the same evidence as the W.P.D., per their incident report, RA 129-130, regarding the bartender's fabricated claim to the responding police that a "girl" was cut. See RA 129-130. **The W.P.D. incident report states, "the Worcester police searched "all area hospitals" and that no girl went to the area hospitals for treatment for a glass cut".** It's undisputed that U. Mass. Hospital is about 1 mile from the Winner's circle Bar. The prosecutor has a duty to learn of any favorable evidence known to others acting on the government's case including the police, regardless of good or bad faith. Kyles v. Whitley, 514 U.S. 419, 438 '95. Imputed to the police is evidence they knew or should have known. Com. v. Lam Hue To 461 NE2776, 779 ('84).

4. There was **no medical/hospital records produced** at **trial** or discovery to corroborate Mann's alleged injuries. (Can't cite a negative-See TR all).

5. After being alerted falsely by the bartender, Schlener, that "glass from the bottle struck a girl in the eye - cutting victim", the **W.P.D. document**, RA 130, (p. 2 of incident report - Ex. D of motion), **"we were unable to locate female victim who left scene prior to arrival and did not go to area hospitals for treatment".** See RA 68 (motion p. 68 "Perma-Investigating Worcester Police Officer" - item 1), & PC 154-(4-17) thru PC 155-1.

6. Responding and investigating W.P.D. officer - Perma asked Schlener and his friends at the bar to come forward with information as to who this girl was and nobody did, PC 154-(5-16). RA 68-item #1.
King claimed the prosecution found the "girl", Mann, January '93, 6 months before trial TR 246-7.See the PC hearing transcript, no girl testified.

7. Schlener, the bartender, admitted under oath at the probable cause hearing that the girl was not hurt or injured by glass, PC 114-2 Q. And during that time is when you determined that the young lady who was injured actually did not have glass in her eye? A.Right.

As per motion RA 33, this fabrication about a girl being cut in the face was like the fabricated bottle

assault; both were originated by the bartender, Schlener, to cover for his friends beating the defendant on the street causing the defendant to be hospitalized, see RA 169 (Ex. Q - p. 3 of motion (defendant brought to hospital by police at 2:25 am on 9-29-92)).

The various prosecution witnesses, and defense witnesses-DePasquale and Perma (both friends of King's) were allowed by the prosecution to use this fabricated Mann injury in the most prejudicial manner possible at trial, see RA 147-149 (motion Ex. K). This included King's and Schlener's perjury at trial,

> TR 194-7 (King) Blood coming around her hand, out her hands, through her fingers down her face.
> TR 588-7 (Schlener) One of the girl's yelled, "my eye it's cut", she had a cut. She was bleeding from the eye. (compare this testimony to Schlener's probable cause testimony above, PC 1 14-(2-4).

King testified at the P.C. hearing the opposite,

> PC 52-1 (Aloise)Q. Isn't it fair to say you don't know and didn't know at the time, certainly, how badly the female was hurt, whether or not it was just a cut on the face that bled or something more serious, Correct?
> A. (King) Correct.
> PC 53-6 Q. Now when Officer Perma's report indicates that Mr. Elbery struck a girl in the eye you don't know that to be true, do you, from your observations?
> A. (King) Right.

There is good reason why there was a void, as above, of real evidence of Mann's cutting, but only

say-so and finger pointing at trial. The evidence is Mann's facial cutting and stitching was more fabrication to cover for and help King get out of trouble, and the prosecution knew and should have known it was false.

Prejudice to the defendant

This facial cutting and stitching to Mann was falsely used as an excuse, like the fabricated bottle assault, for King's illegal citizen's arrest of the defendant. Like the fabricated bottle assault, this false evidence that the defendant cut a girl in the face caused the defendant to, once again, be falsely put in the worst status possible before the jury. Making it all the more likely they would convict the defendant on the other false evidence at trial. The prosecutor is responsible for all evidence at trial that he knew or should have known to be perjury. U.S. v. Agurs, 427 U.s. 97, 103

New trial is required due to this knowing use by the prosecution of perjury. Giglio v. U.S.,405 U.S. 150, 154, Com. v. Tucceri, 412 Mass. 405. See RA 34-36.

A.D.A. Mike Ball Bolsters his case with Mann Perjury

The prosecutor then compounded this knowing false evidence by using it at trial to justify King's citizen's arrest, tricking the jury. See RA 35 and RA 41-42. Per RA 35, the prosecutor also used this fabricated "Mann injury" in his opening statement, TR 115-16, TR 111-(8-22)(see also RA 109-p. 109 of motion-claim XVI), and closing argument, TR 1237 - 21, (see RA 149 - Ex. K of motion). Per the Mass. S.J.C. this blatant misrepresentation of evidence to the jury and abuse requires a new trial. Com. v. Collins, 386 Mass. 1, 13. RA 35. This also violates the Due Process Clause -14th Amendment - U.S.

Constitution causing a trial that was not fair. Berger v. U.S. 295 U.S. 78, 84-89 '35.

Ineffective Assistance of Counsel - RA 37-39

Defense Attorney, Louise P. Aloise, refused to challenge Mann's claim of facial cutting and stitching. The above evidence, that Mann was never injured/stitched, was available to Aloise at trial but he refused to alert the jury. Instead, Aloise confirmed/stipulated, in his opening statement, the prosecution's fabricated evidence of Mann and her facial cutting, TR 129-3,RA 38. Further, Aloise refused the defendant's demands that Aloise subpoena Mann's hospital records, RA 37. This is another count of ineffective assistance of counsel by Aloise that causes need for a new trial because there was no adversarial process at the trial, and that caused the defendant a 10-year prison sentence. Strickland v. Washington, 466 U.S. 668, 690 '84.

APPENDIX H

EXHIBIT J
Footnote 1 - Tom King's Injuries

Tom King's trial testimony
Direct Exam-Ball
TR 20 1-17 He took his thumb and jammed it into my eye (indicating).

TR 20 1-20 On the outside of my eye he jammed it in almost behind the eye and kept pushing the thumb in real hard.

TR 202-12 He... jammed that hand, that thumb back into my eye on the inside of my eye and kept pushing the thumb into my eye.

TR 202-24 I put my hand to my eye and I had the sticky fluid, vitreous fluid from my eye, and blood on my hand coming out of my eye. I was blinded in the eye. My other eye was watering. I couldn't see very good.

TR 203-9 I told somebody they have to get me to the hospital or I was going to lose my eye.

TR 203-18 They put some type of solution in my eye to clean it out. But also a solution under my eye to numb the eye, to freeze the eye, they put patches over both eyes.

TR 203-24 I got a laceration on the eyeball.

TR 204-1 Is that a cut? Yes.

TR 204-3 As a result of that, were you able to see as well as you had in the past?

-5 No Sir.

TR 204-6 Are you having any problems seeing?
-7 Yes, I am having a problem with the eye.
-8 You are still having difficulty; is that right?
Yes, sir.

TR 204-13 How long did you have that patch?
-14 I had the patch on a couple of days, three day maybe.

Cross-Exam-Aloise
TR 381-6 This eye totally blind this eye I could not see.

TR 385-12 No. It was lacerated.
-13 lacerated? Yes, sir.

TR 425-8 I don't know exactly how long the finger was in there, sir.

TR 426-9 I didn't see anything because I was blind.

TR 431-8 (Aloise) Obviously whatever hand or finger went into your eye.
-10 (King) The thumb.

TR 431-22 I was trying to get his thumb out of my eye. He kept pushing it harder and harder and harder.

TR 432-5 Thumbnail.

Re-direct-Ball
TR 440-13 And it shows a laceration in your eye?
-15 Yes, sir.

TR 468-9 (Q. Ball) Both your eyes you had _ _ _ one was cut and the other one had __
A. One eye was totally blind. In my left eye was totally blind.

TR 468-14 It was opened but it was_ _ _ I was totally blinded. Right eye was watering, and it was so filled up with water and fluid and blood and fluid from this eye was into that eye that I couldn't see.

TR 468-24 Q.(Ball) Taking out eye, indication mayhem, correct? A. Yes.

TR 469-8 (Ball) But it is fair to say, isn't it, that it appeared as if your eye was taken out that night, didn't it?
(Aloise) - object, sustained (no cure)
-17 (Ball) But fortunately your eye was not taken out, right?
-19 (King) Yes.

Re-Cross-Aloise
TR 479-1 Medical records say "eye superficial abrasion"? (Aloise questioning)
-3 I was told laceration, I can't read that (medical report).

TR 479-14 Doctor Arinella told me I had laceration, as far as my eyeball.
-19 (Aloise) Does Arinella's medical record say superficial abrasion?
-22 I can't read it. (medical evidence).
-23 (Aloise) All right.

TR 486-14 Both eyes blind because my right eye had vitreous fluid, and blood from left cut eye.

De Pascuale - Description of King's eye injury.

TR 715-22 And I looked up and blood was pouring from his eye.

TR 717-8 King told me he thought he was hurt, and I saw the blood and started yelling for someone to get an ambulance.

O'Connor - Description of King's eye injury

TR 756-14 The lower auricle of this eye was full of blood, and there was blood coming out of the eye itself. (auricle means ear lobe).

Schlener - Description of King's eye injury

TR 595-10 I don't know. His eye hurt, his lost - his eye is out, you know.

TR 595-23 And could you have said the he lost his eye or and eye is out or something like that?

TR 598-5 I thought his eye was popped out.

TR 640-19 No I just remember the heap and then you know 30-45 seconds after that the guy came screaming that his eye is out.

Richard Traskiewicz - Description of King's injuries
Direct Exam-Ball
TR 500-20 When they went to the ground I advanced that's when I saw Elbery put his finger in this (King's) eye.

TR 501-6 This is when the fight turned around King was on top of him then when the finger went into his eye we jumped in to stop it. I saw blood coming out of his eye.

Cross-Exam Aloise
TR 544-10 That's when I observed him putting his finger in this eye.

TR 549-12 When you observed Elbery put his finger in his eye, King has Elbery on his back in the middle of Shrewsbury St.?
A. Right

TR 552-1 King was on top of Elbery.

Redirect-Ball
TR 571-5 He stuck his finger in his eye to the point where it was bleeding.

TR 571-7 When Mr. King came back that eye was bleeding right?
-9 Correct.

Recross-Aloise
TR 573-19 Elbery was on his back with King on top of him when Elbery finger went into King's eye and face?
A. Right.

John Hayes - Defense witness
Direct Exam-Aloise
TR 913-6 Did it (the right eye) appear to be bloodshot or tearing at that point?
A. No it wasn't.

TR 913-3 It was fine (right eye).

TR 913-16 He was doing like this and sticking his finger inside his eye and rubbing it like he had something in his eye.

TR 916-6 He (King) said all the fluids from his eye was rushing out. He was going to lose all of the fluids in his eye.

TR 916-9 Did you see any fluid dripping out of his eye?
A. No I didn't.

TR 916-11 Did you see any blood dripping out of his eye?
A. No.

TR 917-10 (King's right eye) it was open.

TR 918-16 "I must have got poked in the eye". He said "I think I got poked in the eye". (Hayes quoting King)

Cross- Exam - Ball
TR 938-6 Just looked bloodshot (left eye)

TR 954-20 It wasn't that dark (red). (referring to the pictures of King's eye that were developed by King's Co-workers at the Westboro Police Dept.)

Perma (Worcester cop and defense witness- saw King in E/R 30 minutes after incident~

Cross-Exam Ball
TR 995-24 His eye was bleeding.

TR 996-1 Which eye was bleeding? A. Left eye.

TR 202-18 Yet, King claimed he had 2 patches over his eyes.

Ball Opening
TR 113-16 King's eye is bleeding terribly. The defendant reached up a second time and grabbed his eyeball again, and he is trying to dig out the eye.

TR 115-20 tried to take out King's eye on two separate occasions.

Aloise Closing

TR 1224 You look at the medical records of Mr. King you will see it was a superficial abrasion _ _ _ we are now under oath exaggerating. He was in the hospital one hour and twenty minutes not to suggest he didn't get injured.

TR 1225-8 There is no doubt King had bloodshot eye and maybe tearing burns severely, no doubt about

that either. That is usually what happens when you get poked the eye. What was he to do? Was he not in reasonable fear of bodily harm?

(Although he made no effort to present this evidence at trial, it is clear or documented Aloise knew that King was lying about his injuries)(argument is not evidence at trial-well settled law).

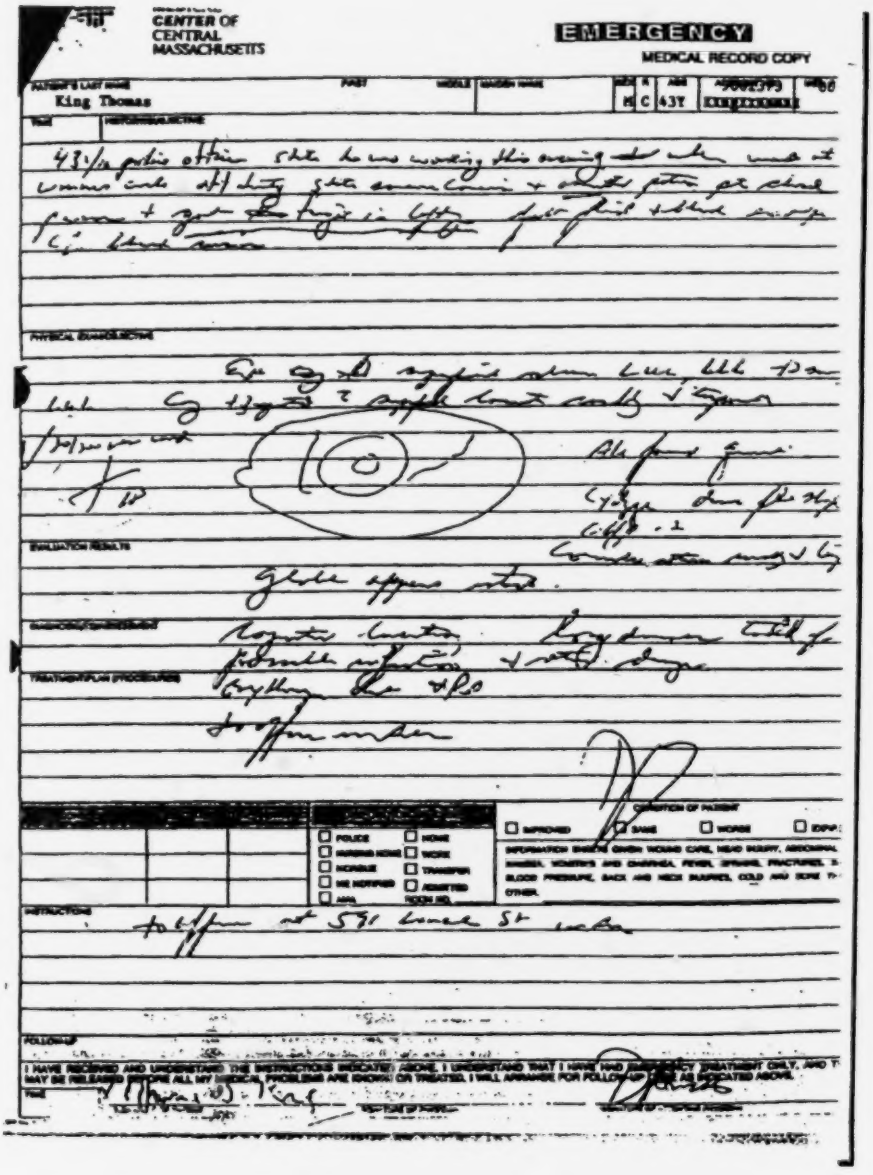
Ball Closing

TR 1234-18 Remember when he said he gouged King's eye?
(A.D.A. Ball citing evidence that never occurred at trial and without objection from Aloise)

TR 1239-20 At that time is when the defendant gets him one arm free, digs his finger into King's eye and tries to put it out.

TR 1240-8 Consider the extent of the force that he exercised to use that type of deadly force that is called, it is not-it is likely to cause serious bodily injury. And I think all of you sitting there would look at the evidence and look at the facts someone trying to poke someone's eye out could cause serious bodily injury.

APPENDIX I



CENTER OF CENTRAL MASSACHUSETTS

EMERGENCY

MEDICAL RECORD COPY

PATIENT'S LAST NAME: King | FIRST: Thomas | MIDDLE | MAIDEN NAME | SEX: M | RACE: C | AGE: 43Y | ACCOUNT # | MED #

TIME | HISTORY/OBJECTIVE

43 y/o pubic attire states he was working this morning at the [illegible] when he was struck by [illegible] in the right eye. [illegible]

PHYSICAL EXAMINATION

[illegible]

EVALUATION RESULTS

[illegible]

TREATMENT/PLAN/PROCEDURE

[illegible]

DISPOSITION OF PATIENT: ☐ IMPROVED ☐ SAME ☐ WORSE ☐ EXPIRED

☐ POLICE ☐ HOME
☐ NURSING HOME ☐ WORK
☐ MORGUE ☐ TRANSFER
☐ NO NOTIFIED ☐ ADMITTED
☐ AMB. TOOK NO.

INFORMATION RELATED GIVEN: WOUND CARE, HEAD INJURY, ABDOMINAL PAIN, VOMITING AND DIARRHEA, FEVER, SPRAINS, FRACTURES, HIGH BLOOD PRESSURE, BACK AND NECK INJURIES, COLD AND SORE THROAT, OTHER

INSTRUCTIONS

[illegible]

FOLLOW-UP

I HAVE RECEIVED AND UNDERSTAND THE INSTRUCTIONS INDICATED ABOVE. I UNDERSTAND THAT I HAVE HAD EMERGENCY TREATMENT ONLY, AND THAT I MAY BE RELEASED BEFORE ALL MY MEDICAL PROBLEMS ARE KNOWN OR TREATED. I WILL ARRANGE FOR FOLLOW-UP AS INDICATED ABOVE.

TIME | SIGNATURE OF PATIENT | SIGNATURE OF WITNESS

BEST AVAILABLE COPY

July 22, 1994 **American Investigative Services A I S Inc.**

"43 2/10 Police Officer states that he was working this evening when he was at Winner's Circle off duty. States someone came in and assaulted patron. Patient chased person and got finger in left eye. Felt fluid and blood come out of eye. Complained of blurred vision." (Patient is the Police Officer Mr. King.)

Physical exam objective reveals the following: "External examine revealed superficial abrasion to his lids and two swelling left upper lids. Conjunctival was plus 3, injected with superficial Keroatin nasally and temporally. Anterior chamber formed and quiet. Dialed fundus revealed disc flat, sharp pink, cup to disc. Disc point to commotio retina nasally and temporally globe appears intact."

Diagnosis: Conjunctival laceration, long discussion. Told of possible infection and retinal damage. Given Erythromycin ointment and pressure patch. To office in the AM.

Instructions: To office at 591 Lincoln Street in AM.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS. SUPERIOR COURT
CRIM. NOS. 93-01351,
93-0 1352, and 93-0 1354

COMMONWEALTH

v.

MICHAEL ELBERY

AFFIDAVIT IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL

Dr. Joe Hull being duly sworn deposes and says:

1. That I am a licensed physician in the Commonwealth of Massachusetts. I am board certified in emergency and internal medicine. I am presently Medical Director of the Emergency Department of Anna Jaques Hospital in Newburyport.

2. I have reviewed the hospital record of Thomas King attached hereto and marked Exhibit One.

3. The record reveals that the injury to the left eye consisted of superficial abrasions to the lids and a small laceration of the conjunctiva which did not require suturing. The globe (eyeball) was not penetrated and there was no bleeding into any part of the eye or impairment of vision.Treatment was conservative with application of antibiotic ointment and a patch which is typical for minor injuries to the-superficial covering of the eye.

4. In my opinion, these injuries are superficial and are consistent with being poked in the eye. In my

opinion, one would expect to find more serious injuries if someone had jammed his thumb into that eye on the inside of the eye and kept pushing his thumb into the eye.

5. In my opinion, the injury sustained here would not have resulted in the leaking of any vitreous fluid or noticeable blood loss from the eye.

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 5th DAY OF JANUARY, 1996.

/s/
Dr. Joe Hull

March 12, 1996

Dear Bob,

Here are the answers to your questions. Sorry it has taken me so long to get back to you.

1. "Conjunctiva plus 3" means that there was moderate inflammation of the conjunctival membrane, i.e., the eye was red.

2. "Angio. #20" is a 20 guage intravenous needle that was started in the arm.

3. Betadine prep. is a very clean, iodine washing/preparation or cleansing of the skin to remove bacteria.

4. Injected means red and inflamed. I think keroaltin is a misspelling of keratin, the outer, most superficial cell layer of the skin and eye.

5. The anterior chamber of the eye is normal when it is formed and quiet (an odd term to mean not inflamed or diseased).

6. The fundus is the back of the eye where the retina is seen after the pupil is dilated and one looks through the pupil with an ophthalmoscope. The optic nerve head is the disc and it should be normally flat and the cup should be sharp and pink when normal.

Let me know if you have any more questions.

/s/ Joe Hull